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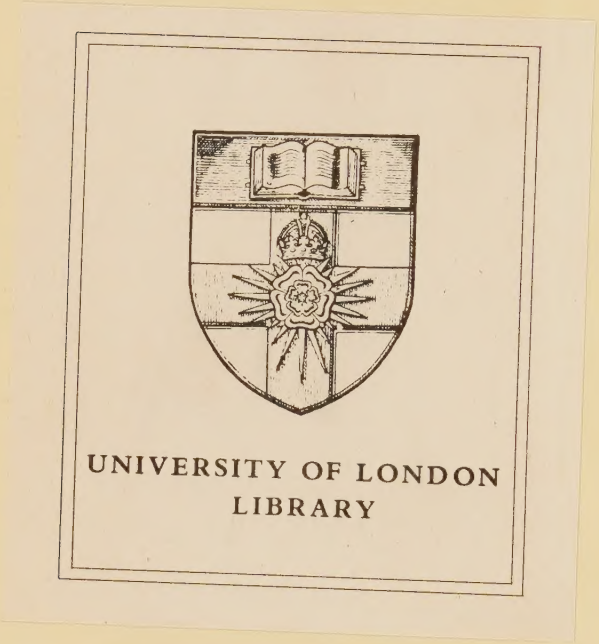

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THE COURT OF BANKRUPTCY,

IN IRELAND,

AND

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CORRIGENDA.

Page 414, note (5), *for* "6," *read* "16."

,, 490, note, lines 10 and 11, *for* "held by Proclamation. Under this Act," *read* "held. By Proclamation under this Act."

,, 533, note (1), *for* "9 A. & E. 435," *read* "7 B. & C. 61."

NOTE.

The COURT OF APPEAL have reversed the decision of the IRISH LAND COMMISSION in DUNNE, TENANT; KNOLLES AND BABINGTON, LANDLORDS, [1896] 2 I. R. 671.

CASES

DETERMINED BY

THE QUEEN'S BENCH AND EXCHEQUER DIVISIONS

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND BY

THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL,

AND BY

THE COURT FOR CROWN CASES RESERVED.

1897.

MACARTNEY, GRANTOR; GORDON, GRANTEE (1).

Land Com. 1896.

June 3, 15.

Redemption of Rent (Ireland) Act, 1891 (54 & 55 *Vict. c.* 57), *s.* 1—*Redemption price—Suitability of holding for building ground—Probability of its conversion into such.*

In determining the sum to be paid for the redemption of a rent, under the Redemption of Rent (Ireland) Act, 1891 (54 & 55 Vict. c. 57), the Land Commission may take into account the suitability of the holding for building ground, or the probability of any portion of it being converted into such.

APPEAL by the grantor from an order of Mr. Commissioner Lynch, dated the 28th March, 1896, fixing the redemption price of a fee-farm rent of £300 per annum at £3000 guaranteed land stock, and £250 cash.

(1) Before BEWLEY, J., and FITZGERALD, Q.C., and O'BRIEN, Commissioners.

Land Com. 1896.

MACARTNEY, *Grantor*; GORDON, *Grantee.*

The facts of the case and the question involved are stated in the judgment of Bewley, J.

Campbell, Q.C., and *Meredith, Q.C.* (with them *J. H. Moore*), for the appellant.

Gordon, Q.C., and *Hume*, for the respondent.

June 15.

BEWLEY, J.:—

This case came before us on an appeal from an order of Mr. Commissioner Lynch, dated the 28th March, 1896, whereby it was ordered that the fee-farm rent of £300 per annum, created by an indenture of fee-farm grant of the 4th May, 1878, should be redeemed, and that the redemption price should be fixed at £3000 guaranteed land stock, and £250 cash. On the evidence submitted to us, the case is one to which the Redemption of Rent (Ireland) Act, 1891 (54 & 55 Vict. c. 57), applies, and the only question we have had to consider is the sufficiency of the redemption price.

The holding out of which the rent issues contains about 148 acres statute measure, and is situate about a mile from the present municipal boundary of Belfast, while part of it adjoins the parliamentary boundary of the borough. No improvements have been made on the holding by Mrs. Gordon or her predecessors in title. Thomas Gordon, to whom the fee-farm grant of the 4th May, 1878, was made, was a butcher, cattle dealer, and dairyman, residing in Belfast. He died in 1880 intestate, and his interest thereupon passed to his only son and heir-at-law Jonathan Gordon. The latter went, with his mother, Ellen Gordon, to Canada shortly after his father's death, and on the 24th July, 1894, having then gone to reside in Utah in the United States, he conveyed all his interest in the holding to his mother, in consideration of natural love and affection. In the month of November, 1894, she served an originating notice under the Redemption of Rent Act, and in the year 1895 returned to Ireland. In the interval between the death of Thomas Gordon, the grantee, and the commencement of the present proceedings the lands were sublet from time to time to dairymen and others for grazing purposes. The rent of £300 appears to have been paid with regularity from the making of the

fee-farm grant in 1878 to the present time, and it has not been proved that the rents and profits derived from the lands have not been amply sufficient at all times to meet the rent, and leave a margin of profit. In Thomas Gordon's time the lands were used merely as a stand for cattle awaiting sale or slaughter, and but for the fact that the tenant was not resident in Belfast at the time the Land Act of 1881 was passed, there might be some grounds for contending that the holding fulfilled all the conditions of a town park within the meaning of that Act. It has been proved, and is a matter of common knowledge, that the city of Belfast has been extending rapidly of late years, and that the population and number of inhabited houses have been increasing by leaps and bounds. Within the last twenty years the population has increased over 50 per cent., and the tenement valuation has increased in much the same proportion. On other parts of Mr. Macartney's estate, lying between the holding in this case and the Blackstaff river, considerable portions of holdings let in fee-farm have been sublet at large rents for the purpose of erecting villa residences, workmen's houses, terraces of dwelling-houses, and other buildings. The Belfast Street Tramways Company have recently extended their system to within a short distance from the present holding. A piece of land containing 21A. 2R. 20P. adjoining the holding has been let in perpetuity, at the yearly rent of £129 15*s*., being £6 per statute acre, and on it a large brewery has been built; and upon the evidence Mr. FitzGerald and I are satisfied that before many years have elapsed a substantial part of the present holding will, in all probability, be built on. Portion of it on the slope of the Black Mountain may, no doubt, be too steep for that purpose, but a part of the southern division, between the Lisburn and Glenavy roads appears quite suitable for building. There is nothing in the fee-farm grant of the 4th May, 1878, that would prevent the grantee from subletting or subdividing the holding, or letting portions for building purposes.

Under the Redemption of Rent Act, a rent coming within the scope of the Act is to be redeemed by payment of such capital sum as may be agreed on, or, as, in case of difference, may be determined by the Land Commission (regard being had to the adequacy of the security) in like manner as if it were a head rent redeemed

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Bewley, J.

under the provisions of section 16 of the Land Law (Ireland) Act, 1887. In the case of a well-secured head rent, a large number of years' purchase of the rent may be fixed as the redemption price; and in a case like the present, the grantor whose rent is redeemed is entitled to get such sum as the rent is actually worth at the time of redemption, having regard to the value of the security. If the grantor does not consent to the redemption, and the holding is an agricultural holding, not excluded from the operation of the Act, a fair rent is fixed in the ordinary way; but where the rent is redeemed the grantor is entitled to receive the true value of the rent, having regard to all the circumstances of the holding. In estimating the redemption price in the present case, Mr. Commissioner Lynch thought he was bound to exclude from consideration the suitability of this holding for building ground or the probability of any portion of it being converted into such. That is to say, though the tide of building operations in Belfast is flowing steadily inland in all directions, he considered that this holding must be treated as if it was fenced off from it by an impenetrable wall. While holding that no speculative value is to be placed upon the rent by reason of the suitability of part of the holding or the probability of its being used for building purposes, Mr. Fitz Gerald and I are of opinion that if the rent in the present case was put up for sale by public auction in Belfast, the circumstances to which I have referred as to the character and situation of the holding and the growth of the city, would naturally influence a purchaser and enhance the price that would be offered. A holding that appears at present to have a large accommodation value for butchers and cattle dealers, and in the near future will in all probability have buildings erected on it, cannot be treated as if it were dedicated in perpetuity to be used solely as an ordinary agricultural farm. To estimate the redemption price on the latter basis would lead us to award to the grantor a sum ascertained on an artificial hypothesis not in accordance with the facts, and less than the actual value of the rent. Mr. Campbell pointed out a striking example of how the opinions of experts are sometimes contradicted by facts. On another holding on the same estate lying nearer to the city, held by Hugh Kirkwood, an application was made to redeem a fee-farm rent of £224 issuing out of an area of

Land Com. 1896.

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a little over 79 acres statute measure, and was dismissed by Mr. Commissioner Lynch on the ground that portion was sublet in perpetuity. The inspector for the Land Commission in that case, a most careful and experienced gentleman, reported that Mr. Kirkwood, the grantee, had no saleable interest in the holding at the existing rent, but shortly after the application was dismissed the tenant's interest was put up for sale by public auction in Belfast, and sold for over £2000.

In the present case, Mr. Commissioner Lynch has fixed the redemption price at a sum that would be about twelve years' purchase of the rent. Mr. FitzGerald and I are of opinion that this sum is too little, and we fix the redemption price at £3000 guaranteed land stock, and £600 cash. The grantor is entitled to the costs of the appeal.

O'BRIEN, Commissioner, dissented.

Solicitors for the grantor: *Moore, Keily, & Lloyd.*
Solicitors for the grantee: *Carson & M'Dowell.*

D. M'C. M.

Q. B. Div.
1895.
Oct. 29–31.
Nov. 6.
Appeal.
Dec. 16, 17.

GARDNER *v.* BROOKE AND OTHERS (1).

(1893. No. 491.)

Contribution—Co-contractors—Promissory note—Right of one of several co-debtors, compelled to pay the common debt, to contribution against his co-debtors, where, by the operation of the statute, the remedy of the creditor against those others was already barred at the time of such payment—Statute of Limitations—Common Law Procedure (Ireland) Act, 1853 (16 & 17 *Vict. c.* 113), *ss.* 20, 24)—*Mercantile Law Amendment Act,* 1856 (19 & 20 *Vict. c.* 97), *s.* 14.

A, B, and C were jointly and severally bound, as principals, on a promissory note given to a Banking Company, dated 28th April, 1882, and payable six months after date. A's executor (the plaintiff), who had made payments on foot of the note within six years from its maturity, and, in 1891, within six years from the date of such payments, had paid to the Bank the sum of £1844 in full discharge of the debt, sued B and C's executors for their shares in this amount so paid, as being money paid for their use and at their request, and obtained verdict and judgment. B, who had given no acknowledgment, nor paid anything since the note was signed, moved that judgment should be entered for him on the ground that the plaintiff's right of action was statute-barred, there being, in 1891, no common liability to the creditor, and therefore no right to contribution or indemnity, and on the ground that section 14 of the Mercantile Law Amendment Act, 1856, protected B from liability not only to the creditor, but also to his co-debtors:—

Held, by the Queen's Bench Division, and *affirmed* by the Court of Appeal, that the plaintiff was entitled to retain his judgment; that, in regard to the right to contribution between co-debtors, the Statute of Limitations only commences to run from the date at which one of them is damnified by being compelled to pay more than his just share of the common debt; and that section 14 of the Mercantile Law Amendment Act, 1856, was intended only to give protection against the common creditor, and did not affect the rights and liabilities of the co-contractors *inter se.*

Wolmershausen* v. *Gullick ([1893] 2 Ch. 514) approved.

NEW TRIAL MOTION.

The action, which was tried before the Lord Chief Justice and

(1) In the Queen's Bench Division, before O'BRIEN, JOHNSON, and GIBSON, JJ.

a special jury in Hilary Term, 1895, was brought by the plaintiff Robert Gardner, as executor of David M'Birney, deceased, against Arthur Brooke and Arthur Wallace, as executors of Thomas Brooke, deceased, and John C. Bloomfield, for contribution towards the sum of £1844 3*s.*, paid by the plaintiff in 1891, on foot and in discharge of two joint and several promissory notes dated 28th April, 1882, and made by J. C. Bloomfield, David M'Birney, and Thomas Brooke to the Belfast Banking Company for, in all, £3450, payable six months after date. The writ of summons in the action, which was issued on the 21st January, 1893, claimed £614 14*s.* 4*d.*, being one-third of the balance so remaining due and paid by the plaintiff, against the executors of Thomas Brooke, as money paid for the use of the defendants, and at their request, and claimed a similar amount against the defendant Bloomfield. On the pleadings and on the evidence offered at the trial, it appeared that the notes were made on the 28th April, 1882; that M'Birney died on the 22nd October, 1882; that the defendant Bloomfield never gave any acknowledgment, or made any payment on foot of the notes subsequent to their being made; that Thomas Brooke made some small payments on account shortly after 1882, and that the plaintiff, as executor of M'Birney, paid, on the 15th August, 1888, £20, on the 30th July, 1891, £2860, and, on the 18th October, 1891, £1844 3*s.*, which last sum the Banking Company accepted in full discharge of their claim. It was in respect of this last payment that the plaintiff now claimed contribution. Separate defences were taken, the pleas in both cases being that the notes were made for M'Birney's accommodation, and that the plaintiff's right was barred by the statute. The jury found that the three makers were principals, and judgment was entered for the plaintiff. The executors of Thos. Brooke acquiesced in this result; but Bloomfield now moved for a new trial, or that the verdict and judgment should be changed, on the grounds—(1) that the finding of the jury, that the notes were not accommodation notes, was against the weight of evidence, and (2) that the plaintiff's remedy was statute-barred. For the purposes of this report it is only necessary to deal with the second ground, the net question being, whether (M'Birney, Bloomfield, and Brooke, the makers of the promissory notes of the 28th April,

Q. B. Div. 1895.

GARDNER v. BROOKE.

1882, being three principal co-debtors) the representative of M'Birney—having paid a sum, less than one-third of the liability on foot of the joint debt, within six years from maturity, and so having kept alive the creditor's claim against himself as such representative, and having further, after six years from maturity of the note, paid the sum of £1844 3*s.* in satisfaction of the creditor's claim—was entitled to claim contribution towards this last payment from Bloomfield, who had never made any payment on account of, or given any acknowledgment in respect of, the notes after they were made.

Drummond, Q. C. (*F. A. P. Hamilton* with him), for the defendant Bloomfield :—

The notes matured six months after the 28th April, 1882, and this action was instituted in January, 1893. Assuming that Bloomfield was a principal co-debtor with M'Birney, still, as he made no payment, and gave no acknowledgment, he ceased to be a co-debtor after the end of six years from maturity, at which time the cause of action had arisen : Common Law Procedure (Ireland) Act, 1853 (16 & 17 Vict. c. 113), sect. 20. The payment in respect of which this action is brought was made after the expiration of such six years, when Bloomfield was no longer liable to be sued on the note by the creditor; the payment by the plaintiff cannot revive Bloomfield's liability, and the action therefore cannot be sustained. To hold otherwise would be to disregard sect. 14 of the Mercantile Law Amendment Act, 1856, which amends ss. 20 and 24 of the Act of 1853 (1).

(1) The Common Law Procedure (Ireland) Act, 1853 (16 & 17 Vict. c. 113), section 20, provided that "All actions grounded on any lending or contract, express or implied, without specialty . . . shall be commenced and sued within six years after the cause of such actions, but not after."

Section 24 of the same Act provided that in actions grounded upon any simple contract an acknowledgment or promise to take the case out of the operation of the provisions as to the limitation of actions must be in writing, signed by the party chargeable thereby; "and where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of this Act, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them :

In *Re Frisby* (1) the defendant, a surety for a mortgagor, had made no payment, and had given no acknowledgment for over twelve years, and there it was held that payments by the mortgagor kept the creditor's right alive against the surety, on the ground that sect. 14 of the Act of 1856 did not refer to sect. 40 of 3 & 4 Wm. 4, c. 27, to which sect. 8 of 37 & 38 Vict. c. 57, corresponds. The decision would there have been different had sect. 14 of the Mercantile Law Amendment Act, 1856, applied.

[JOHNSON, J., referred to *Wolmershausen* v. *Gullick* (2).]

Serjeant Dodd, and *Carton*, *Q.C.* (*C. O'Connor*, *Q.C.*, and *H. Wilson*, with them), for the plaintiff:—

The case of *Wolmershausen* v. *Gullick* (2), to which Mr. Justice Johnson has referred us, and the cases there collected by Mr. Justice Wright in his judgment, establish the proposition that where one co-debtor is released, even by the creditor's own act, this release does not prevent his co-debtors from claiming contribution. As to sect. 14 of the Mercantile Law Amendment Act, 1856, the effect of sect. 24 of the Common Law Procedure Act was to allow payment by one of several principal debtors on foot of a promissory note to keep alive the liability to the common creditor of the other principal debtors on such note. Section 14 altered this, but it did not go further or affect the rights, *inter se*, of the co-debtors. Section 14 is printed as unrepealed in the "Statutes Revised," except that "Act of the 16th and 17th years

provided always that nothing herein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whomsoever."

The Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), sect. 14, provided:—"In reference to the provisions of . . . the Act of the sixteenth and seventeenth years of the reign of Her present Majesty, chapter 113, section 20, when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor, or administrator, shall lose the benefit of the said enactments, or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money by any other or others of such co-contractors or co-debtors, executors or administrators."

(1) 43 Ch. D. 106. (2) [1893] 2 Ch. 514.

Q. B. Div. 1895.

GARDNER v. BROOKE.

of Her present Majesty, chapter 113," has been changed into "The Common Law Procedure (Ireland) Act, 1853." [JOHNSON, J.: Do you mean to say that the editors of the Statutes Revised alter the text of the Acts? I think some notice should be taken of this.] Where one co-contractor volunteers a payment after his liability has ceased he may well be held not to be entitled to relief by way of contribution: see *Davies* v. *Humphries* (1); but, in the present case, the plaintiff was legally liable throughout; his loss—the amount he had to pay, over and above his own share as M'Birney's representative—was not ascertained until he made the payment in 1891, and the statute can only run from that date. Where one co-debtor makes payments on account, the creditor may forbear to sue any of the parties liable, and the other co-debtors get the benefit of such forbearance. Otherwise, not only must the creditor enforce payments, so as to keep the liability alive, from each of his co-debtors, but each co-debtor must see that those by whom the burden is shared with him make payments, or give acknowledgments, lest his right to contribution be lost. The right to contribution does not depend on contract, but on the principle of equity, that a common burden should be borne equally: see the cases collected under *Dering* v. *Earl of Winchelsea* (2), in 1 White and Tudor's Leading Cases. The plaintiff could not know to what contribution he was entitled, until he had paid, or was called on to pay more than his share.

F. A. P. Hamilton, in reply:—

The plaintiff could have brought an action in 1882 in the form adopted in *Matthews* v. *Saurin* (3). That is the only point from which the statute can run. The payment in 1891 was after Bloomfield's liability had ceased, and cannot be said to have been made, expressly or impliedly, at his request: *Lampleigh* v. *Brathwait* (4). The decision of Wright, J., in *Wolmershausen* v. *Gullick* (5), even if it can be taken to be a considered judgment upon this point, is not a binding authority on the Court; and,

(1) 6 M. & W. 153.
(2) 1 W. & T. 114; 1 Cox, Ch. Cas. 318; 2 Bos. & P. 270.
(3) 31 L. R. Ir. 181.
(4) 1 Smith, L. C. 136.
(5) [1893] 2 Ch. 514.

apart from the question of the statute, the plaintiff has been guilty of such laches that he is not entitled to relief: *Ratcliffe* v. *Graves* (1).

The following authorities, in addition to those mentioned and those collected in *Wolmershausen* v. *Gullick* (2), were also cited in the argument:—*Reynolds* v. *Doyle* (3); *Angrove* v. *Tippet* (4); *Edyer* v. *Knapp* (5); *Manley* v. *Boycot* (6); *Boulty* v. *Stubbs* (7); *Hardy* v. *Fothergill* (8).

[Counsel for the defendant Bloomfield also contended that the finding of the jury, that the note was not signed by the defendant merely for M'Birney's accommodation, was against the weight of evidence.]

Cur. adv. vult.

NOV. 6.

O'BRIEN, J.:—

The executor of one of several makers of a promissory note, whose liability to the creditor was kept alive beyond six years from the making of the note, and who was compelled to pay the whole debt, sues another maker for his portion, within six years after the time of payment, but outside that period from the making of the note; and the question is whether he is barred; in other words, whether the bar of the statute extends to the collateral liability as well as to the original debt. The point, though at first assumed to be without authority, must now be considered to have been directly ruled by the case of *Wolmershausen* v. *Gullick* (2), before Mr. Justice Wright, where, upon an action by one co-contractor, a decree was made for an indemnity against another co-contractor, whose liability to the creditor the statute had meanwhile barred. Some doubt arose whether the question was intended to be decided from the brevity of the reference to the statute in the judgment; but the objection in the argument on the same grounds as here, and the decision, could not have been made without overruling it. On ordinary rules we could rest our judgment on that authority; but we are all satisfied no less that it was right in principle. The

(1) 1 Vern. 196.
(2) [1893] 2 Ch. 514.
(3) 1 M. & Gr. 753.
(4) 11 L. T. (N. S.) 708.
(5) 5 M. & G. 753.
(6) 2 Ell. & Bl. 46.
(7) 18 Ves. 20.
(8) 13 App. Cas. 351.

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case of *Dering* v. *Earl of Winchelsea* (1) clearly lays down that the right of a co-surety, who has paid more than his share, to contribution, rests on grounds of equity and is independent of contract, and could not therefore be affected by the lapse of time from the making of the contract. The right comes, in equity, originally and absolutely, by the payment in discharge of a common burthen, and has no existence whatever, inchoate or complete, till the payment is made. It is not therefore affected by what affects the contract. That rule was necessarily the consequence of *Dering* v. *Winchelsea* (1) because in that case the sureties were bound by different bonds, and there was no link of contract between them. And the Chief Baron states that there were precedents of contribution between co-lessees and co-feoffees, which, however, was by the statute of Marlbridge; and *Sir William Harbert's Case* (2) was referred to as containing an example of contribution between parties having no relation of contract to each other. And, though the words of the writ of contribution, quoted by Fitzherbert, "*ex assensu eorum*," contain very early traces of the doctrine of contract, yet this element has certainly been worked out from all modern decisions. The principle came into the English from the Civil law, where it pursues exactly the same consequences and distinctions that are found in equity, all based on community of burthen and benefit from payment, and none from agreement. So far, therefore, as the rule in equity is concerned, to which the law is now made subject, the cause of action, which the statute must apply to bar, is that arising from the fact of payment. However, as the equitable rule applies no less because there is a contract, and the extent of the relief is the same, entitling the party to the whole of the payment that he has made in excess of his share, and from the solvent parties alone, and there is a contract in this case, we have to see whether there is anything in the words of the statute itself, as was contended, the force of which requires the collateral as well as the original remedy to be extinguished by time. We must see, therefore, first, what is the legislation that now regulates the matter? Lord Tenterden's Act (9 Geo. 4), while taking away from mere acknowledgment the effect of pre-

(1) 1 Cox, 318; 2 Bos. & P. 270. (2) 3 Rep. 11.

venting the bar of the statute, preserved expressly that effect of part payment. The latter part of sect. 24 of the Common Law Procedure Act (Ireland), 1853, is an exact copy of the clause in the Act of 9 Geo. 4, as to co-contractors, with the same exception as to part-payment. By the Mercantile Law Amendment Act, 1856, it was recited that the law of England and Ireland differed from that of Scotland, and—referring, in section 14, to the case of co-contractors, and to the statute 3 & 4 Wm. 4, corresponding to Lord Tenterden's Act, and to the limitation section of the Irish Common Law Procedure Act—it enacted that part-payment by a co-contractor should not prevent the operation of the statute, which was the point in which the law of Ireland and of England was identical. It therefore repealed the section of the English Act as to payment by a co-contractor, and, being of later date and inconsistent with the similar provision of the Irish Act, of necessity repealed that also.

The case therefore stands upon the effect of the clause in the Mercantile Law Amendment Act, that part-payment by one contractor should not deprive the other of the benefit of the statute. Now, could these words, by any strain, be applied to an action for contribution? Mr. Drummond relied upon the words "so as to be chargeable," as determining the effect of the statute, and having a meaning more extensive than liability directly on the note—as annulling all liability whatever—collateral as well as original. But these words are exactly the same as those in the Act of 9 Geo. 4, and corresponding Irish Act, which enactments, however were confined to the case of acknowledgments merely that could not give rise to any collateral demand. And, moreover, they are merely a statement or exposition of what precedes; and what precedes, in both Acts, is that the party shall not by reason of the payment by a co-contractor lose the benefit of "the said enactments"—the enactments being that an action shall not be capable of being maintained on the causes of action contained in the security after six years. Still further, the subject of the protection which is given by both statutes is the payment of the "principal, interest, or other money"—such, no doubt, as notarial charges—and this is a subject not applicable at all to the demand for an indemnity, but is the direct description of the consequences

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of an action on the contract itself. With respect to the statement of the rule in reference to the action for money paid—which is frequently applied between sureties, though less extensive than the remedy in equity—that the debt which the co-surety has satisfied must be one which the defendant is legally compellable to pay—if this be the true and real principle out of which the implied obligation arises, and it applied to the time when the action is brought by the surety, the condition did not then exist, for the party had ceased to be liable by virtue of the statute. But to whom had he ceased to be liable? To the creditor. If, on the other hand, the principle be that in the making of the promise to the creditor there springs up another and inchoate engagement between the debtors themselves, to come into operation when the payment is made, or if we adopt the more general principle that the community of burthen and benefit is the real ground of the right to contribution, it would be impossible that the statute could be applied to bar a right which might never come into existence at all, for the payment might never be made or required. In that case the objection, that he was not compellable to pay, would not apply, or would merely beg the question, for it was the collateral contract arising from the payment that he was compelled to answer, and so the condition of his being liable to pay would be satisfied in terms, or amount merely to a defective definition of the engagement. It is clear that compellable to pay in the statement of the rule means compellable by means of the engagement which he entered into at the time, and cannot be affected in its application by the statute having gone against the original debt.

I do not consider that we are prevented from this conclusion by the argument that the co-contractor, by making payments from time to time, may keep alive the demand against himself, and in that way indefinitely prolong the liability of the other contractor, for the statute would certainly run from the time of each payment, and therefore would stand from time to time as a boundary of the liability.

JOHNSON, J.:—

First, it is contended for the defendant, Bloomfield, that the finding of the jury against his defence—that he signed the

promissory notes without consideration, and for M'Birney's accommodation, ought to be set aside as against evidence. It is settled law that all the facts and circumstances of the making of the promissory notes in question may be inquired into to come at the truth of the relation of the parties to the notes, and the real transaction between them: *Reynolds* v. *Wheeler* (1), followed in *Macdonald* v. *Whitfield* (2). Three persons were present when Bloomfield signed the notes, viz. Mr. and Mrs. Bloomfield, and Mr. M'Birney. Long before the present action was instituted M'Birney died, but the jury had the oral evidence of Mr. and Mrs. Bloomfield, and also the evidence afforded by the letters and documents in proof, and found that Bloomfield did not sign the notes as accommodation notes. There was lawful evidence for the jury on which they might reasonably have come to that finding, and therefore it cannot be disturbed by this Court. On the same evidence I should, as a juror, have arrived at the same conclusion. Bloomfield, M'Birney, and Brooke, therefore were three principal co-debtors, jointly, as well as severally, bound to the Belfast Banking Co. on these notes for the whole debt, but *inter se* each liable only for one-third of the debt. M'Birney having died, the plaintiff, his administrator, out of his assets, and within six years after the maturity of the notes, paid a small sum (far less than one-third of the whole debt) to the Bank, and more than six years after the maturity of the notes compromised the claim of the Bank on foot of the joint debt by payment of a considerable sum, and in the present action seeks to recover a contribution of one-third from each of the two co-debtors, of whom Bloomfield is one. In answer to this claim Bloomfield relies on the Statute of Limitations, on the ground that, before the plaintiff had paid to the Bank more than one-third of the joint debt, the Statute of Limitations had barred the Bank from recovering any sum on foot of the notes against Bloomfield, and, therefore, that there was then no common liability of the plaintiff and Bloomfield to the Bank on foot of the notes, and, consequently, that no right of, or liability to, contribution exists. This contention, which does not rest on principle or authority, appears to be disposed of by the

(1) 10 C. B. (N. S.) 561; 30 L. J. (N. S.) C. P. 350. (2) 8 App. Cas. 733, 745.

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decision in *Wolmershausen* v. *Gullick* (1). That case was decided in the Chancery Division in England; but the right to contribution at law between co-debtors had its origin in the rules and principles of equity; and Mr. Spence (1 Eq. Jurisd., p. 662), while he carries back the equitable jurisdiction of the Court of Chancery to compel contribution between co-debtors to a period which cannot be traced, also says:—"The principle of contribution was not peculiar to the Court of Chancery; it prevailed from a very early period as regards some subjects, but to a limited extent, in the Courts of Law"; and he cites authorities in the time of Edw. 3, for this position. Under our present system, if there be any conflict between the rules of equity and law, equity is to prevail. In the present case the plaintiff has paid the debt; he treats his co-debtors as solvent; and this case, therefore, is not embarrassed by considerations of the relief given in equity before actual payment of the accrued debt, or of the measure of contribution having regard to the solvency of the co-debtors.

In 1787, Eyre, C.B., dealing with the rights both in equity and at law, says (2)—"If we take a view of the cases both in law and equity, we shall find that contribution is bottomed and fixed on general principles of justice, and does not spring from contract, though contract may qualify it"; and in *Craythorne* v. *Swinburne* (1807) (3), Lord Eldon says, that a surety, called on to pay the principal debt, or any part of it, had a right, in the Court of Chancery, "either on a principle of equity, or on contract, to call on his co-surety for contribution." "I think," he says, "that right is properly enough stated as depending rather on a principle of equity than on contract; unless in this sense that, the principle of equity being in its operation established, a contract may be inferred on the implied knowledge of that principle by all persons, and it must be on such a ground, of implied *assumpsit*, that in modern times Courts of Law have assumed a jurisdiction on this subject." These views are adopted in the House of Lords in *Stirling* v. *Forrester* (4), in which case Lord Redesdale says:—"The question depends upon equity, not upon contract, and in this case a contract

(1) [1893] 2 Ch. 514.

(2) In *Dering* v. *Winchelsea*, 1 Cox, 318; 2 Bos. & Pul. 270.

(3) 14 Ves. 160, 164.

(4) 3 Bligh, 575, 596.

is to be implied. The decision in *Dering* v. *Lord Winchelsea* (1), proceeded on a principle of law which must exist in all countries, that "where several persons are debtors, all should be equal." Lord Eldon's dictum was considered in *Batard* v. *Hawes* (2), in which Lord Campbell, C. J., says (p. 299), that "it will be found to relate rather to the origin of the implied contract than to the time at which it is to be taken to be made," and that "it must be taken to admit the existence of an implied contract." The nature of the contract Lord Campbell defines in an earlier part of his judgment in the same case (p. 296):—"We think that it is not merely the legal liability to the creditor at the time of the payment that we are to regard, but that we must look to the implied engagement of each to pay his share, arising out of the joint contract then entered into"; and later on he says—"In a joint contract for the benefit of all, each takes upon himself the liability to pay the whole debt, consisting of the shares which each co-contractor ought to pay as between themselves, and each, in effect, takes upon himself a liability for each to the extent of the amount of his share. Each, therefore, may be considered as becoming liable for the share of each one of his co-contractors at the request of such co-contractors, and, on being obliged to pay such share, a request to pay it is implied as against the party who ought to have paid it, and who is relieved from paying what, as between himself and the party who pays, he ought, himself, to have paid according to the original arrangement."

These authorities, and the decisions in *Collinge* v. *Heywood* (3); *Reynolds* v. *Doyle* (4); *Webster* v. *Kirk* (5); *Davies* v. *Humphries* (6); *Angrove* v. *Tippett* (7); and several other cases referred to in the argument, establish that, if one of several co-debtors is liable to pay, or pays more than his aliquot proportion of the accrued common debt, he is entitled to require and enforce contribution from his co-debtors; that this right springs either from the rule of equity involved in the obligation arising out of their becoming, and at the time when they became, co-debtors, or from a contract

(1) 1 Cox, 318; 2 B. & P. 270.
(2) 2 Ell. & Bl. 287.
(3) 9 A. & E. 633.
(4) 1 M. & Gr. 753.
(5) 17 Q. B. 944.
(6) 6 M. & W. 153.
(7) 11 L. T. (N. S.) 708.

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between them at that time, implied by law from the universality of that rule; that, by virtue of the original common obligation, any co-debtor may enforce this right against his co-debtors when, and as soon as, he is damnified by being liable or compellable to pay, or paying, the accrued debt, or more than his aliquot proportion of the accrued debt which his co-debtors so undertook to share with him; and that, consequently, as between the co-debtors, the Statute of Limitations commences to run, not from the accrual of the joint debt to the creditor, but from the time when the co-debtor, being so damnified, is entitled to sue his co-debtor for his default in discharging his aliquot proportion of the joint debt according to the original arrangement *inter se*.

For these reasons I am of opinion that the verdict and judgment against the defendant Bloomfield ought to stand.

GIBSON, J.:—

The verdict, so far as the finding of fact is concerned, cannot be disturbed. The question as to the Statute of Limitations deserves more consideration.

If the notes had been paid before the holder's remedy against the defendant had been barred, the plaintiff's right to sue for contribution would have been indisputable. Does it make any difference that, at the time the plaintiff made the payment, the remedy against the defendant was barred?

The defendant's counsel contend that it does, and that the action cannot be maintained. They rely on two grounds. The first is the Mercantile Law Amendment Act, which, they say, protects the defendant not only from direct liability to the creditor, but also from indirect liability to the other joint makers. I think, however, that the statute only operates as between creditor and debtor, and does not prejudice rights and liabilities of the co-debtors *inter se*. The right to contribution must depend on the relation of the joint contractors to one another, and the contract or duty thence arising.

The second point raised is that there was no contract or duty to indemnify, inasmuch as at the time of payment the defendant was not legally compellable to pay the debt. No doubt in many cases at law the action for contribution was based on this principle

of implied contract, where one is compelled to discharge a debt for which another is then legally responsible; and, as most of such cases were decided before the Mercantile Law Amendment Act, and at a time when all co-debtors were liable, that *ratio decidendi* was there sufficient. But I am of opinion that, even at common law, an action of contract could have been sustained on the relation in which the joint makers stood to one another, and the implied *assumpsit* and request flowing from the common liability. Lord Eldon's opinion in *Ex parte Gifford* (1); Baron Parke's in *Kemp* v. *Finden* (2); and the decision of the King's Bench in *Browne* v. *Lee* (3), recognise this principle of liability. In equity, however—and equity must now prevail—the relief was based not on contract, but on a fundamental principle of natural justice that the burden should be shared equally. Contribution is not limited to cases of guarantee, but extends to all cases where one is compelled to pay more than his proportion of a joint liability: *Ramskill* v. *Edwards* (4). The question here is, what is the extent of the obligation of the joint makers to one another. Is it an unqualified liability, according to the proportionate shares of each, to indemnify any joint maker who may at any time be legally compelled to pay more than his share? or does the duty depend on the co-debtor, who has paid in excess of his share, being merely subrogated into the creditor's rights? or does the obligation only bind a party so long as he himself remains liable to the creditor, and therefore may himself require the benefit of indemnity against the others? The first view is, I think, plainly the true one. When they signed the note, the parties must have contemplated that it would be paid, and that the burden should be shared equally. The fact that one happens to escape from legal liability to the creditor, without the consent of his associates, and perhaps even without their knowledge, cannot be allowed to disturb the original obligation between the co-debtors, or to alter the proportions of liability or contribution, which must be ascertained from the note at the time that it was made. The duty to contribute here binds all, so long as any one remains legally liable by virtue of the joint contract.

(1) 6 Ves. at p. 808.
(2) 12 M. & W. at p. 423.
(3) 6 B. & C. 689.
(4) 31 Ch. D. 100.

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I have dealt with this question on principle, but there are authorities which seem in point—that is, if joint contractors enjoy the same right to contribution *inter se* as sureties. It has been held that neither the discharge of a surety by bankruptcy (*Browne* v. *Lee* (1)) nor by the Statute of Limitations (*Wolmershausen* v. *Gullick* (2)) bars the remedy of a co-surety against the surety so discharged. And Lord Eldon even held that the release of a surety by the creditor's voluntary act did not prejudice the co-surety's right to contribution: *Ex parte Gifford* (3). He considered that the liability of the co-surety to the creditor was not thereby affected. Whether the voluntary discharge of a surety might not release co-sureties may be a matter of some difficulty: *Mercantile Bank of Sydney* v. *Taylor* (4). On the assumption that they were not thereby released, Lord Eldon's great authority directly supports this action, as the creditor's remedy against M'Birney certainly was not extinguished by the fact that the statute had run in favour of Bloomfield.

In my opinion, though the plaintiff might possibly have maintained a suit, such as in *Wolmershausen's Case* (2), before he paid off the note, for prospective indemnity, he became entitled, on making the actual payment, to a distinct and substantive cause of action for contribution: *Ex parte Snowdon* (5). To the right of action so arising the Statute of Limitations is no defence at law, and cannot therefore be a defence in equity.

A. E. R. J.

Appeal. Dec. 16, 17.

The defendant appealed to the Court of Appeal (Lord Ashbourne, C., FitzGibbon, Barry, and Walker, L.JJ.)

Drummond, Q.C., and *F. A. P. Hamilton*, for the appellant.

Serjeant Dodd, and *Carton, Q.C.* (with them *O'Connor, Q.C.*, and *H. Wilson*), for the respondents.

(1) 6 B. & C. 689.
(2) [1893] 2 Ch. 514.
(3) 6 Ves. 805.
(4) [1893] A. C. at p. 317.
(5) 17 Ch. D. 44.

The COURT OF APPEAL affirmed the decision of the Queen's Bench Division, and dismissed the appeal with costs.

Solicitors for plaintiff: *Larkin & Co.*
Solicitor for defendant Bloomfield: *A. O'B. O'Connor.*

R. D. H.

THE QUEEN (SAURIN) *v.* JUSTICES OF COUNTY MEATH (1).

Q. B. Div. 1896. Oct. 30.

Certiorari—*Want and excess of jurisdiction—Revision of tithe rentcharge—Condition precedent—Non-compliance—Affixing notice to principal outer door—4 Geo. 4, c. 99, s. 43.*

Where the only place of religious worship in a parish, other than a ruined and doorless parish church, was a Roman Catholic chapel, it is not a sufficient compliance with the provisions of section 43 of the statute 4 Geo. 4, c. 99, which prescribes the method of revision, if the required notice was posted on a notice-board, which was fixed on a gate-pier facing the principal entrance to the chapel, but on the opposite side of the road.

MOTION to make absolute a conditional order, dated the 6th August, 1896, to remove and quash an order, made by the Chairman and Justices of the county Meath, at the Quarter Sessions held at Navan on the 22nd June, 1896, on the ground that it was made without, and in excess of, jurisdiction.

On the 22nd June, 1896, an application was made to the Justices sitting at Quarter Sessions, on behalf of Michael J. Saurin and two other owners or occupiers of land in the parish of Ardcastle, in the county of Meath, charged with the payment of lay impropriate tithe rentcharge, to have a reduction made in such tithe rentcharge. The evidence given at the hearing of the application showed that there was no parish church within the limits of the parish of Ardcastle, attended by church-goers, but that there still existed a ruined building, which had been the old parish church, and in which the stone archway, at the former entrance,

(1) Before SIR P. O'BRIEN, L.C.J., and HOLMES and MADDEN, JJ.

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alone remained by way of door. The only known place of religious worship within the parish was the Roman Catholic chapel. On two successive Sundays, viz. the 31st May and the 7th June, 1896, the process-server went to the chapel for the purpose of affixing to the door thereof the notices, signed, as required by the 4 Geo. 4, c. 99, sect. 43, copies of which he had already affixed to the stone archway already mentioned. When refused permission to affix such notices to the principal outer door of the chapel, he thereupon posted them upon a stone gate-pier facing the principal entrance to the chapel, but on the other side of the road, which was indicated to him as the place where notices to be read by frequenters of the chapel were usually affixed. The Chairman and Justices refused the application, holding that, while the ruin of the former church was no longer the church of the parish within the meaning of the 43rd section, the posting of the notices upon the Roman Catholic chapel—the only place of religious worship—was not effected in the manner prescribed by the Act.

Matheson, Q.C. (with him, *Chaytor*), for the applicants:—

The process server did everything which reasonably could be done under the circumstances. The place on which the notice was posted was, if not the actual door of the chapel, the place where church notices were usually placed, and where its contents must have come to the knowledge of the congregation. He had been refused permission to affix it to the door of the chapel, or to any better place than that on which it was placed. Under section 11 of the Grand Jury Act the notice must be affixed to the door of the police-barrack. But in *Connell's Presentment* (1), it was held a sufficient compliance with that section that the notice was hung up on the notice board, within the door of the barrack. The posting of the notice in that case was a condition precedent: *Reg.* v. *The Recorder of Cork* (2); and see *In re Cooper* (3).

[THE LORD CHIEF JUSTICE: Is not the object of prescribing that the notice shall be affixed to a specified door, to obviate any controversy as to what is a reasonable place, for the purposes of public

(1) 22 L. R. Ir. 94. (2) 16 Ir. C. L. R. 1. (3) 15 Ir. L. T. 195.

observation?] There can be no doubt that the notice was seen. Section 7 of the Land Law (Ireland) Act, 1887, allows the posting of the ejectment notice "on a police barrack, or courthouse in the district." The Judges have interpreted this in the General Orders of 1891 (Ord. XLVII., R. 3), by allowing the notice to be affixed to the notice board on such barrack. And see the provisions as to posting ejectments for tithe rentcharge "upon some public and conspicuous place in the said parish or union" in Deasy's Act (section 57). The requirements of the statute of 4 Geo. 4, c. 99, have been recognised as too strict, and the Court should not require a precise compliance with them.

A. C. Meredith (with him, *Campbell, Q.C.*), for the lay impropriator:—

The words are precise, requiring the notice to be affixed to a particular place, where it may be looked for. This is a condition precedent to the jurisdiction of the magistrates, and must be construed as mandatory, not as directory: *Reg.* v. *Justices of Lancashire* (1); *Reg.* v. *Justices of Meath* (2); Maxwell on Statutes, 2nd Edition, p. 450. There was a question of fact for the determination of the magistrates, *i.e.* whether the notice had been affixed to the principal outer door of the chapel. The Court will not disturb their decision: *Reg.* v. *Bolton* (3).

Chaytor, in reply.

SIR PETER O'BRIEN, L.C.J.:—

The point in this case is a short one, and the question which presents itself for our determination is this: whether the necessary notice has been affixed, in the manner required by the Act of 4 Geo. 4, c. 99. This Act provides, by the 43rd section, that it shall be lawful "for any three or more owners or occupiers of land in such parish charged with the payment of the sum of three pounds or upwards each in respect of such composition, to cause a notice in writing . . . to be affixed on the principal outer door of the church in such parish, or if there shall not be any church in such parish, then upon the principal outer door of every

(1) 8 Ell. & B. 563. (2) [1896] 2 I. R. 1. (3) 1 Q. B. 66.

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Sir P. O'Brien, L.C.J.

known place of religious worship in such parish, on two successive Sundays" as is therein directed.

Now nothing can be more precise than the command expressed in this section: viz. that the notice is to be affixed to the principal outer door. It was not, in this case, affixed to any physical portion of the outer door of the chapel. It was not even affixed to the pier of the gate at the principal entrance into the chapel-yard. But it was attached to a post or pier, facing the principal entrance to the chapel, but on the opposite side of the road, on a structure, in no way connected with what I may call the curtilage of the chapel. Was that sufficient? In our judgment it was not. The notice was not affixed to any part of the church, of the fabric or structure of the church, or even in its grounds. It may have been—indeed I think it probably was, placed in such a position that the people coming to the chapel saw it, and thereby got notice of its contents; but the method adopted does not fulfil the mandatory requirements of the Act of Parliament.

In *prescribing* the precise and specific method that was *prescribed*, it appears to me that the object of the section was to prevent all questions as to whether the interested persons had got actual and effectual notice of the intended application or not. We are not now to consider whether it would have been sufficient compliance with the Act, if the notice had been put upon the gate pier of the entrance to the chapel yard, as, at the commencement of the argument, I thought had been the case. The due affixing of the notice in accordance with the strict provisions of the section, is, without any question, a condition precedent to the jurisdiction of the magistrates. As to *Connell's Presentment* (1), referred to in the course of the arguments, the grounds and reasons of the decision in that case are not assigned; but the language of the 11th section of the Grand Jury Act is not identical with that of the section now under consideration, and the Judges there may have based their decision upon the very different wording of that section. For my part I do not say whether I approve or disapprove of the decision in that case. With regard to the sections in Deasy's Act, and in the Land Act of 1887, to which Mr. Matheson called our attention,

(1) 22 L. R. Ir. 94.

it is unnecessary to say more than that the language used in those Acts differs widely from that in the Act of Geo. 4. Our decision may appear to rest on a narrow construction of the statute, but we must adhere to what we believe to be its true construction, however narrow it may seem to be. In our opinion the decision of the Chairman was correct, and the conditional order must be discharged.

HOLMES, J.:—

I agree. The Legislature, in making provision for the periodical revision of tithe rentcharge enacted that, as a condition precedent to such revision, a certain notice should be given in a certain way. The language of the Legislature is very specific. After providing for the contents and signature of the notice, the section states that it is to be *affixed*, not merely to the door, but to the outer door; and not merely to the outer door, but to the principal outer door of the religious edifice. Upon these words questions of fact may arise, and I can well understand a discussion as to whether a certain door was, or was not, the principal door, or was or was not an inner door. I am disposed to think that if such a question were decided by a County Court Judge, this Court would refuse to interfere by the issue of a writ of *certiorari*.

But here is a case where the notice was not affixed to any door, principal or otherwise, outer or inner, nor indeed to any portion of the edifice. It was affixed to a post which forms no part of the building, but stands upon the opposite side of the street. Unless we were to disregard the provisions of the Legislature, and read instead, that a notice might be given in any way which the Queen's Bench Division might think sufficient, we must discharge the conditional order.

MADDEN, J.:—

I also am of opinion that the applicant has failed to comply with an essential part of the conditions necessary to entitle him to the benefit of the statutory provisions for revision of tithe rentcharge. So long as tithes were paid in kind, they varied from

Q. B. Div. 1896.

THE QUEEN v. JUSTICES OF MEATH.

Madden, J.

time to time from the necessity of the case. But when tithes in kind were abolished, and superseded, first by a composition, and ultimately by a legal rentcharge, it became necessary to provide some machinery by which the annual sum payable out of tithable land could be varied, having regard to the price of produce. This being a matter in which the inhabitants of each parish are interested, careful provision was made for giving publicity to an application for revision of tithes. I think that the notice in the present case was probably posted in the manner best calculated to carry out the general intention of the statute. But, unfortunately for the applicant, the statute uses very specific words. If it had simply directed the notice to be posted on the principal outer door, I might have held the posting in the present case to satisfy such a direction. But it must be not merely "posted," but "affixed" on the principal outer door of the church. I think it must be actually attached to something that can reasonably be described as the door of the church.

Although I am disposed to give a liberal construction to these words, I cannot possibly hold that they are applicable to a pier, which forms no part of the fabric of the church, and is indeed situated on the opposite side of the road.

Solicitors for applicants: *Montgomery & Chaytor.*
Solicitors for the lay impropriator: *Rooke & Co.*

J. H. P.

KELLY, TENANT; HAMILTON, LANDLORD (1).

Land Com. 1896.

Oct. 29. Nov. 10.

Landlord and tenant—Purchase of tenant's interest in portion of holding—Agreement by purchaser to take from landlord as future tenancy—Land Law (Ireland) Act, 1881 (44 & 45 *Vict. c.* 49), *section* 20, *proviso* (1); *section* 22.

In 1893 K., who had for some years held as tenant or in conacre from G. 2 acres, portion of land held by G. as tenant to H., agreed with G. to buy his interest in those two acres for £25. H. agreed to accept K. as tenant, at £4 a-year, and a written agreement was entered into, by which K. agreed to take from H., as a future tenancy, the said two acres at the yearly rent of £4, and to pay £25 for the interest in the holding. The £25 was paid direct to G.:—

Held, distinguishing *Boyd* v. *Tredenick* ([1896] 2 I. R. 364), that K. was a future tenant.

REHEARING of application by the tenant to have a fair rent fixed. A sub-commission decided that the tenant was a present tenant, and fixed a fair rent for the holding.

The evidence, so far as material on the question decided, was as follows:—

John Kelly, son of the tenant, deposed that he got this holding from Robert Griffin, who held it, with other land, under a single tenancy from Mr. Hamilton. Griffin sublet the land to him for ten or twelve years previously. Griffin also sublet the other portion he had. About four years ago Griffin asked witness would he buy his interest in this small place that he (witness) had from Griffin yearly, and witness said he would. Griffin asked what he would give for it. Witness said that he would give £25. "Well," said he, "you will get it." They went into Mr. Hamilton's, the agent's; at the time he did not settle the matter, but he did in some time afterwards, and witness paid the money to Griffin, and Mr. Hamilton's agent took him, or rather his mother, as tenant at £4 a-year. Witness was paying Griffin £6 clear of taxes. The

(1) Before BEWLEY, J., and FITZGERALD, Q.C., and O'BRIEN, Commissioners.

Land Com. 1896.

KELLY, *Tenant*; HAMILTON, *Landlord.*

part that Griffin used to sublet to someone else was 1¼ mile from this, and was sold to another man. Witness signed an agreement for his mother. The £25 was paid direct to Griffin; it was not paid to Mr. Hamilton's agent; he (the agent) was not present when it was paid, but he knew witness was paying it. Witness did not understand he was signing as a future tenant; the agreement was read, but he did not understand it; he had no legal advice; he thought when he paid the money he was entitled to the interest of the other (the former) tenant.

Cross-examined.—The agent told him he would accept him as tenant, and that he must sign an agreement; the agreement was read in the office. It was in conacre he took from Griffin. He though it was a fair bargain between man and man.

The agreement was as follows:—

I hereby agree to take from the Right Hon. Ion T. Hamilton, as a future tenancy under the Land Act of 1887, that part of the townparks of Skerries, in the parish of Holmpatrick, barony Balrothery East, and county of Dublin, being portion of a farm formerly held by John Griffin, containing two acres and eight perches statute measure, and marked No. 9 on Ordnance Map, at the yearly rent of four pounds, to be paid half-yearly, on 25th day of March and 29th day of September, the first half-yearly payment to be made on 29th day of September next. And I further agree to pay all taxes, except the landlord's proportion of poor rate and income tax, and to pay the sum of twenty-five pounds for the interest in this holding.

Dated this 1st day of July, 1893.

Signed for MARY ANNE KELLY.
JOHN KELLY.

Witness JAMES S. GRIFFIN.

Wakely, for the tenant, referred to the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), section 20, proviso (1), and section 22, and to *Boyd* v. *Tredenick* (1), and contended that the present was a stronger case than that in favour of the tenant.

F. A. P. Hamilton, for the landlord, contended that *Boyd* v. *Tredenick* (1), did not apply: here there was no estoppel, and the facts were different from those in that case.

(1) [1896] 2 Ir. R. 364.

BEWLEY, J. :—

In this case a question of future tenancy was raised. The tenant, undoubtedly, holds under an agreement dated the 1st July, 1893, whereby she agreed to become a future tenant of the present holding. It appears that the present holding was part of a larger holding held, prior to 1893, by a tenant named Robert Griffin. An arrangement was come to in that year that this portion should be given up by Griffin, and let direct by the landlord to Mary Kelly, and that a rent should be fixed, accordingly, by the landlord for it. The arrangement was carried out by the agreement of the 1st July, 1893, already referred to; by which she agreed to take the holding under a future tenancy. On the part of the tenant it was argued that this case came within the principle of *Boyd* v. *Tredenick* (1), decided by this Court, and that the tenancy, notwithstanding the form of the agreement, was a present tenancy. But that case is plainly distinguishable from the present. There a present tenancy was partitioned with the sanction of the landlord, and a portion of it sold as an existing tenancy to another person, and the Court held that the tenancy remained a present tenancy. In this case the intention of the parties was to put an end to the old tenancy, so far as this part of the holding was concerned, and to create an entirely new tenancy. Surrender depends on intention, and the doctrine of implied surrender is not destroyed by section 20 of the Land Act of 1881: *Conroy* v. *Drogheda* (2). The terms of the tenancy, in the present case, are regulated by the agreement of the 1st July, 1893, and not by any prior contract of tenancy, and Mary Kelly is, in my opinion, a future tenant. The order of the sub-commission fixing a rent, must, therefore, be discharged, and the originating notice dismissed.

Solicitor for the tenant: *C. Friery.*
Solicitors for the landlord: *T. T. Mecredy & Co.*

D. M'C. M.

(1) [1896] 2 I. R. 364. (2) [1894] 2 I. R. 590.

Land Com. 1896.

Nov. 24.

HARRINGTON, Tenant; COLOMB, Landlord (1).

Landlord and tenant—Application to fix fair rent—First occasion on which Land Commission Court sat—Service of originating notice on Land Commission during first sitting—No motion in Court—Subsequent order fixing fair rent—Commencement of statutory term—Application to determine judicial rent for second statutory term—Land Law (Ireland) Act, 1881 (44 & 45 *Vict. c.* 49), *ss.* 8 (8), 60.

An originating notice of application by a tenant to fix a fair rent for his holding was served on the landlord and the Irish Land Commission, during the extended sitting (20th October to 12th November, 1881), constituting the first occasion on which the Land Commission Court sat after the passing of the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), but no motion was made in Court, nor was the application "recorded," or any order or ruling made in respect of the same, during such extended sitting. An order fixing a fair rent was made on the 20th November, 1882. An originating notice of application to fix a fair rent for a second statutory term having been served in July, 1896:—

Held, on the authority of *Chaine* v. *Nelson* (12 L. R. Ir. 272) and *Smyth* v. *Moore* (32 L. R. Ir. 129), that no application to the Court, within the meaning of section 60 of the said Act, had been made on the first occasion on which the Court sat; that the first statutory term commenced from the rent-day next succeeding, not the day on which the Act came into force (22nd August, 1881), but the fixing of the rent; and that the notice to fix a fair rent for the second statutory term was premature.

This case was placed in the list for argument on the question whether the tenant's notice of application to fix a fair rent for a second statutory term was premature.

The Irish Land Commission commenced their first Court sitting on the 20th October, 1881, and by General Orders of the 19th and 27th October, 1881 (2), they directed that such sitting, forming the first occasion on which the Court sat [see Land Law (Ireland)

(1) Before Bewley, J., and Fitz Gerald, Q.C., Commissioner.

(2) See *Chaine* v. *Nelson*, 12 L. R. Ir. 272, at p. 285.

Act, 1881 (44 & 45 Vict. c. 49), s. 60 (1)] should extend to and include the 12th November, 1881.

On the 31st October, 1881, the tenant's predecessor served on the predecessor of the landlord an originating notice of application to the Land Commission Court to fix the fair rent for his holding. On the 1st November, 1881, a copy of the notice was sent by post to the Land Commission [See Land Commission Rules (1st October, 1881), 24, 26, and 38] and was received by them on the following day. No motion or application was, however, made in Court during such extended sitting, nor was the application "recorded," or any order or ruling in reference to the case made during that period.

The case was sent to a Sub-Commission, who, by order in the ordinary form, dated the 20th November, 1882, fixed the fair rent at £15.

On the 1st July, 1896, an originating notice of application by the tenant to have a fair rent fixed for a second statutory term was served on the landlord and sent to the Land Commission, but the officers declined to list the same for hearing, on the ground that the mere service of the notice in November, 1881, did not constitute an application to the Court within the meaning of section 60, that the first statutory term commenced to run from the gale day following the 20th November, 1882, that the last twelve months of that term had not yet begun, and that the present notice was premature [see section 8 (8)].

Ignatius J. O'Brien, for the tenant :—

Section 60 of the Act of 1881 applies to the order of the 20th November, 1882, and that order is of the same effect as if it

(1) Section 60 is as follows:—"Any application which a tenant is authorised by this Act to make to the Court shall, if made to the Court on the first occasion on which it sits after the passing of this Act, have the same operation as if it had been made on the day on which this Act comes into force; and any order made upon such application shall be of the same effect as if it had been made on the day on which this Act comes into force, unless the Court otherwise directs; and the person by whom such application is made shall, if the Court thinks just, be in the same position and have the same rights in respect of his tenancy as he would have been in and would have had if the application had been made on the day on which this Act comes into force."

Land Com. 1896.

HARRINGTON, *Tenant*; COLOMB, *Landlord.*

had been made on the day on which the Act came into force. The Land Commission sat continuously as a Court for over three weeks, and the originating notice was served on them and filed during that period. This constituted an "application to the Court." *Chaine* v. *Nelson* (1), decided that the words in section 60, "on the first occasion on which it sits," must be read, "during its first sitting"; and the tenant's predecessor made an application to the Court during the first sitting, and complied with the requirements of the section. It might be otherwise if the Land Commission were a Court in the ordinary sense: but under the Act of 1881, it is merely a corporation, "deemed" for some purposes to be a Court [see sections 37 (3), 42]; and the application to fix a fair rent is made to it as a corporation entrusted with certain powers. The service and filing constitute an application to the Court, and once the notice is filed, it should be treated as a continuous application made to the Land Commission while it was sitting. *Chaine* v. *Nelson* (1) did not necessarily decide that the process of "recording" was the only way of treating the application under section 60.

Wakely, for the landlord:—

Section 60, itself, clearly indicates that application there means a motion or application made in Court: it expressly deals with an application "made to the Court." Moreover, this point was decided in *Chaine* v. *Nelson* (1), and *Smyth* v. *Moore* (2).

BEWLEY, J.:—

In this case a question of some importance and novelty arises, but there appears no reason why we should withhold our judgment. The tenant claims the right to have a fair rent fixed for a second statutory term. This right depends on whether the original application of the tenant to have a fair rent fixed for the first statutory term came within the 60th section of the Land Law (Ireland) Act, 1881. That Act came into operation on the 22nd August, 1881. The first Rules thereunder were made on the

(1) 12 L. R. I. 272. (2) 32 L. R. I. 129.

1st October, 1881. The Court of the Land Commission sat for the first time on the 20th October, 1881, and that sitting was continued, *de die in diem* up to the 12th November, 1881, with the exception, of course, of Sundays. In the case now before the Court, the originating notice was received in the office of the Land Commission on the 2nd November, 1881, but no application on behalf of the tenant was made in open Court on that day, or on any subsequent day during the first sitting. The 60th section of the Act of 1881 provides [His Lordship read the section]. During the sittings which commenced on the 20th October, and continued until the 12th November, numerous applications were made on behalf of tenants to have fair rents fixed, and in each case, when the matter had been mentioned, it was "recorded" (as it was termed), and then adjourned for further hearing. When that hearing afterwards took place, the cases in which an application had been so made were dealt with in a different way from other applications. Where a fair rent was fixed, a special form of order was adopted in these cases, showing that the tenant had applied on the first occasion on which the Court sat, and declaring also, in the language of the 60th section, that the Court considered it just that the tenant should be in the same position, and have the same rights in respect of his tenancy, as if the application had been made on the day on which the Act came into force. Unfortunately, in the case now before us, I imagine, from pure ignorance, no application was made in Court, but the originating notice was merely transmitted to the Land Commission. Can it be said that the receipt of this notice in the office, on one of the days on which the Land Commission Court was sitting, was an application made to the Court on the first occasion on which it sat?

In my opinion the question is determined by the decisions of the Court of Appeal in *Chaine* v. *Nelson* (1), and *Smyth* v. *Moore* (2). In the first of these cases Law, C., in dealing with the construction and effect of section 60, says (p. 283):—"We cannot, . . . in my opinion, ascribe to the expression 'application to the Court' any such artificial meaning as has been contended for, but must take it in its natural and ordinary sense as denoting a motion

(1) 12 L. R. I. 272. (2) 32 L. R. I. 129.

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HARRINGTON, *Tenant;* COLOMB, *Landlord.*

Bewley, J.

actually and formally made to the Court." Again, at p. 294, Fitz Gibbon, L.J., says:—"I have no doubt that section 60 refers to a step in Court and before the Court as the condition of obtaining the benefit of it."

The requirement of an application to the Court may, under some provisions of the Land Acts, be satisfied by the service of an originating notice, as, for example, under section 5 of the Land Law (Ireland) Act, 1887 (50 & 51 Vict. c. 33); but in *Smyth* v. *Moore* (1) the Court of Appeal has held that though the service of an originating notice is an application to the Court for one purpose under section 1 of the same Act, it is not an application to the Court for the purpose of altering the *status* of the lessee applying. That application must be made actually to the Court, and followed by an adjudication of the Court. In *Smyth* v. *Moore* (1), at p. 137, the Lord Chancellor, in discussing the case of *Chaine* v. *Nelson* (2), says:—"Lord Chancellor Law, and the other Judges, pointed out that application to the Court meant an application, not to the party, nor out of Court, but in the Court."

It is not competent for this Court to give any decision conflicting in any way with these high authorities. The delivery by post at the Land Commission offices of an originating notice on one of the days between the 20th October and 12th November, 1881, on which the Land Commission Court sat, cannot be treated as an application made to the Court on the first occasion on which it sat. As I pointed out in the course of the argument, the mere receipt in the Land Commission offices of an originating notice on some day in the interval between the issue of the Rules on the 1st October, 1881, and the 20th October, 1881, the first day on which the Court sat, not followed by any application in open Court, could not on any reasonable principles of construction be considered as an application to the Court on the first occasion on which it sat, and if the transmission of an originating notice to the Land Commission, prior to the 20th October, 1881, did not give the applicant the benefit of the 60th sect. of the Act of 1881, it would be an absurdity that a similar transmission on one of the

(1) 32 L. R. I. 129. (2) 12 L. R. I. 272.

days on which the first sitting was being held, should put the later applicant in a better position.

Land Com. 1896.

HARRINGTON, *Tenant*; COLOMB, *Landlord.*

The originating notice must be dismissed.

Solicitor for the tenant: *Moriarty.*

Solicitor for the landlord: *Jameson.*

D. M'C. M.

FOX, TENANT; GLOSTER, LANDLORD (1).

Land Com. 1896.

Nov. 24. Dec. 8.

Landlord and tenant—Assignment by tenant in 1895*—No notice of intention to sell—Proceeding by landlord to set aside sale pending at commencement of Land Law (Ireland) Act,* 1896 (59 *&* 60 *Vict. c.* 47)*—Alienation otherwise than for consideration in money or money's worth—Section* 19 *of Act—Retrospective effect—Section* 50 (1).

The effect of section 50 (1) of the Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47), is that in cases pending at the commencement of the Act the rights and obligations of the parties are to be determined in accordance with the law as altered by the several provisions of Part I. thereof, save where such provisions are expressly prospective.

In 1895 a tenant, without giving any notice to the landlord of his intention so to do, assigned his holding to one person. The landlord, before the commencement of the Act of 1896, served an originating notice to have the sale declared void. The application came on for hearing after the commencement of the Act, when the Court were of opinion that the transaction was an alienation otherwise than for consideration in money or money's worth:—

Held, that the provisions of section 19 of the Act were not to be restricted to alienations after the passing of the Act, that they governed the rights of the parties in these proceedings, that regulation (5) of section 1 of the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), did not apply, and that the relief sought could not then be granted.

ORIGINATING NOTICE by the landlord of application to declare a sale of the tenancy to Mary Grady void, on the grounds that the tenant had failed to give notice of his intention to sell, or of the name of the purchaser, or of the consideration agreed to be given for the tenancy.

(1) Before BEWLEY, J., and FITZGERALD, Q.C., Commissioner.

Land Com. 1896.

Fox, *Tenant*; Gloster, *Landlord.*

The assignment to Mary Grady was dated the 2nd October, 1895. The originating notice was served in June, 1896, and the decision in the case turned on the effect of the provisions of section 19, and section 50, sub-section (1) of the Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47), which was passed, and came into operation on the 15th August in that year. These provisions, and the facts of the case, are stated in the judgment of Bewley, J.

D. B. Sullivan, Q.C., for the landlord, in support of the application.

Crowe, for Mary Grady.

Dec. 8.

Bewley, J.:—

In this case the landlord applied to the Court under section 1, sub-section (5) of the Land Act of 1881, to declare void a sale made by Peter Fox to Mary Grady of his tenancy in a small holding in the county of Clare, containing 8 statute acres, held under a tenancy from year to year at the yearly rent of £8, on the grounds that he had failed to give the landlord notice of his intention to sell the tenancy, or of the name of the purchaser, or of the consideration agreed to be given for the tenancy.

In 1890, when Miss Alicia Gloster came into receipt of the rents of the property on which this holding is situate, Peter Fox was the tenant in occupation of this holding, and the receipts for the rent were given to him in his own name until the year 1892, when he appears to have emigrated to the United States. In 1895, proceedings to fix a fair rent of the holding were taken in the name of Peter Fox, but when the case came on for hearing before a Sub-Commission, it was proved that he was not in occupation, and by an order of the 24th April, 1895, the originating notice was dismissed.

A civil bill ejectment for non-payment of rent was subsequently brought by Miss Gloster, and a decree for possession was obtained on the 17th October, 1895. An originating notice to fix a fair rent, dated the 19th November, 1895, was then served on behalf of Mary Grady, a sister of Peter Fox, claiming to be

Land Com. 1896.

Fox, *Tenant*; GLOSTER, *Landlord.*

Bewley, J.

tenant of the holding, and when it came on for hearing before a Sub-Commission in the month of February, 1896, it was adjourned to enable an application to be made to the County Court to redeem the tenancy.

These proceedings were afterwards taken, and a writ of restitution was granted, and on the hearing of the application for the writ, a deed was produced, dated the 2nd October, 1895, duly executed by Peter Fox, by which, for the nominal consideration of one dollar, he assigned the holding to Mary Grady.

The present proceedings were then instituted by Miss Gloster, who, until the production of the deed in the County Court proceedings, had no notice of any transfer of the tenancy to Mary Grady.

On the hearing of the application before this Court, the case made on behalf of Mary Grady was, that her mother had been the tenant, and not her brother, Peter Fox, and that she was entitled to the holding under an unproved will of her mother.

It appeared to me, however, that a much more serious objection existed to the application made by the landlord.

The originating notice of the application to declare the sale void was served on the 26th June, 1896, and the proceedings were pending on the 15th August, 1896, when the Land Law (Ireland) Act, 1896, was passed and came into operation.

Under the provisions of section 57 of the Land Act of 1881 "sale," "sell" and cognate words in that Act include alienation and alienate, with or without valuable consideration. Section 19, however, of the Land Act of 1896, enacts that "the alienation to one person only of a holding by way of mortgage, or family settlement, or where marriage forms a portion of the consideration, or *otherwise than for consideration in money or money's worth*, shall be a sale within the meaning of sect. 1 of the Land Law (Ireland) Act, 1881, but the provisions of the several regulations thereof other than regulation (6) shall not apply thereto"; and section 50, sub-section (1) provides that:—"Part I. of this Act," which includes section 19, "shall, save as is by this Act expressly provided, apply to every proceeding pending at the commencement of this Act."

I am clearly of opinion that the transaction carried out by the

Land Com. 1896.

Fox, *Tenant*; Gloster, *Landlord.*

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assignment of the 2nd October, 1895, sought to be set aside was "an alienation . . . otherwise than for consideration in money or money's worth." The dollar mentioned as the consideration was not paid and was not intended to be paid, and the assignment was in substance a purely voluntary transfer from brother to sister of all the interest he had in the holding. If therefore the case comes within the 19th section of the Act of 1896, the Court has no jurisdiction to declare the sale void, as the jurisdiction to do so arises under regulation (5) of section 1 of the Act of 1881, and by the express words of section 19 of the recent Act this is not a regulation that applies to an alienation of this description.

In my opinion, the very sweeping terms of section 50, sub-section 1 of the Act of 1896, render it necessary in cases pending at the commencement of the Act, that the rights and obligations of the parties shall be determined in accordance with the law as altered by the several provisions of Part I. of the Act, save where such provisions, as for example section 2 and section 10, sub-section 2, are expressly prospective. From the date of the passing of the Act this Court has always held that section 1 of the Act and the alterations in the law thereby made as to exemption from rent in respect of certain classes of improvements apply to all cases pending at the passing of the Act.

It appears to me that the provisions of section 19 cannot be restricted to alienations made after the passing of the Act, and that they must govern the rights of the parties in the present proceedings. Therefore although the landlord in the present case may have been entitled to institute these proceedings at the time they were commenced, the relief sought cannot now be granted owing to the passing of the Land Act of 1896. The originating notice must therefore be dismissed, but under the circumstances, without costs.

Solicitor for Mary Grady: *O'Meehan.*
Solicitor for the landlord: *Dundon.*

D. M'C. M.

EARL OF MEATH, TENANT; MEGAN, LANDLORD (1).

Land Com. 1896.

Nov. 25, 26. Dec. 8.

Landlord and tenant—Tenancy from year to year on expiration of lease containing agreement against alienation—Assignment by person entitled to tenant's interest but not in occupation—Validity of—Home farm of tenant—Land Law (Ireland) Act, 1881 (44 & 45 *Vict. c.* 49), *s.* 1—*Land Law (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 47), *ss.* 5 (1) (*b*), 19, 50 (1).

A lease containing an agreement against alienation expired in 1880, and the lessee continued in possession, paying the same rent. He died in 1887, and R., on the assumption that he was entitled thereto under certain deeds of family settlement, went into possession of the land, and so continued, paying the rent. In 1895 it was discovered that the deeds of settlement did not comprise the tenant's interest in the holding, but that the same had passed to H. under the will of the lessee. H. in the same year, for a nominal consideration, assigned the land to R., who then applied to have a fair rent fixed. In April, 1896, the County Court Judge fixed a fair rent. On an appeal to the Irish Land Commission, heard after the commencement of the Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47) :—

Held, that H. was not, at the time of the assignment to R., a tenant within the meaning of the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), s. 1; that that section did not apply; that the assignment was void; and that R. was not a tenant entitled to have a fair rent fixed.

Irrespective of the provisions of sect. 19 of the Act of 1896, the sale of a tenancy under sect. 1 of the Act of 1881 is not invalidated by the omission to give the notices required by sub-sections 2 and 4 of that section, compliance with the regulations of those sub-sections not being a condition precedent to the transfer of the interest in the tenancy.

Semble, land converted by a tenant into a home farm does not come within the exclusion contained in section 5, sub-section (1) (*b*) (i), of the Act of 1896.

APPEALS by the landlords from orders of the County Court Judge of Wicklow, dated the 22nd April, 1896, fixing the fair rents for two holdings.

By lease, dated the 7th June, 1865, one of the holdings was demised to William Earl of Meath, for eighteen years from the

(1) Before BEWLEY, J., and FITZGERALD, Q.C., Commissioner.

Land Com. 1896.

MEATH, *Tenant;* MEGAN, *Landlord.*

25th March, 1862. The lease contained an agreement restraining assignment without the consent of the landlord.

By an agreement of the same date the other holding was let to the Earl of Meath for the same term, and subject to the same covenants, provided the interest of the lessors should so long last.

On the expiration of the lease on the 25th March, 1880, the Earl of Meath continued in possession of both holdings, paying the same rents as before.

William Earl of Meath died in 1887, and thereupon Reginald the present Earl, on the assumption that he was entitled to the tenancies under certain deeds of settlement, entered into possession of the holdings, and had been since in occupation thereof.

In 1895 it was discovered that the deeds of settlement did not comprise the tenant's interests in these holdings, and that the same passed, under the codicil to the will of the late Earl, to his widow the Dowager Countess of Meath; and by an indenture, dated the 26th October, 1895, reciting the occupation of the lands by the present Earl, under the erroneous supposition that he was entitled thereto, the Countess, for a nominal consideration, assigned the holdings to him.

No previous notice of intention to sell was given to the landlords, but notice of the assignment was, on the 30th October, 1895, served on them.

The Earl, in January, 1896, served originating notices to have fair rents fixed, and, on the hearing of those applications, the orders appealed from were made.

The principal question argued was as to the validity of the assignment. The further facts in the case, and the other questions arising are fully stated in the judgment of Bewley, J.

Matheson, Q.C., and *Molony*, for the tenant:—

The covenant against alienation was inconsistent with sect. 1 of the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), and ceased to have any effect: *In re Wright and Tittle's Contract* (1). *Smyth* v. *Moore* (2) was a case under sect. 1 of the Act of 1887, in which the tenants, before any adjudication on their originating notice to have a fair rent fixed, proceeded to sell, and the question

(1) 29 L. R. Ir. 111. (2) 32 L. R. Ir. 129.

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was whether the mere service of the notice constituted them present tenants. If they had waited until the order had been made, they would have been admittedly within their rights. Here, since 1880, both holdings were held under present tenancies.

By section 57 of the Act of 1881, "tenant" means a person occupying land under a contract of tenancy, and includes "the successors in title to a tenant." Once, therefore, a person has been in occupation under a contract of tenancy, his successors in title are "tenants" under the Act, though not themselves in occupation. Here the late Lord Meath was, at the passing of the Act, in occupation under a tenancy from year to year. On his death the Dowager Countess of Meath became legally entitled to the tenancy, she transferred her estate and interest to the present Earl, and he was in occupation at the date of the service of the originating notice, and is entitled to have a fair rent fixed.

Further, the Countess was in contemplation of law in occupation for the entire period from her husband's death to the date of the assignment by her. She had the legal interest, Lord Meath was not in possession adversely to her, but under a misapprehension, and he subsequently acknowledged her title: he would have been liable to account to her for the profits, but she waived her right by the assignment, and he must be treated as having been in possession as her bailiff, and his occupation was in law hers. She was therefore a tenant within section 1 when she assigned.

The omission to give the notice of intention to sell under sect. 1 of the Act of 1881, does not render the sale void: the service of the notice is not a condition precedent, and the estate passes by a conveyance. The object of the notice is to prevent the landlord's rights from being affected, and sub-sect. 5 protects him.

Further, the conveyance to Lord Meath was an alienation otherwise than for consideration in money or money's worth within sect. 19 of the Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47), and no notice of intention to sell was necessary. That section makes certain rules of law, while section 50 (1), which makes Part I. of the Act apply to proceedings pending at its commencement, deals with procedure, and the effect of the latter provision is that the Court in administering the law in a pending proceeding must do so according to the rules laid down in section 19.

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It has been already decided that the holdings are not demesne.

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Healy and *Wakely*, for the landlords:—

The first section of the Act of 1881 does not destroy a covenant against alienation in a lease until an order has been made fixing a fair rent, and that section has no application to the present case. In *In re Wright and Tittle's Contract* (1) a fair rent had been fixed, and the Court only decided that there the covenant against alienation was inconsistent with the provisions of sect. 1, and that the latter should prevail. Here on the expiration of the lease in 1880, the late Earl held on, and became tenant from year to year: see the Landlord and Tenant Law Amendment Act (Ireland) 1860 (23 & 24 Vict. c. 154) section 5. A covenant against alienation is not inconsistent with a tenancy from year to year, and the agreement in the lease formed one of the terms of the new tenancy.

Moreover, the Countess of Meath when she made the assignment was not in occupation; and although a tenant for the purposes of the Act of 1860, and bound by the covenant in the lease, she was not a tenant within the Act of 1881 (see section 57); and for this reason also section 1 of that Act does not apply. There is a marked contrast between the two statutes. The title of the Act of 1860 is "An Act to consolidate and amend the Law of Landlord and Tenant in Ireland," and by sect. 1 thereof the word "Tenant" is defined to mean "the person entitled to any lands under any lease or other contract of tenancy . . ." The Act of 1881 is "An Act to further amend the Law relating to the Occupation and Ownership of Land . . . ;" and by section 57 "Tenant" means "a person *occupying land* under a contract of tenancy. . . ." Sect. 21 of the same Act requires *bona fide* occupation, as does also the first section of the Land Law (Ireland) Act, 1887 (50 & 51 Vict. c. 33). Although by section 57 of the Act of 1881 every tenancy to which the Act applies is to be deemed to be a present tenancy until the contrary is proved, still, that applies only to a "tenancy" and not to a "tenant," and there is no presumption as to a person being a present tenant. See *The*

(1) 29 L. R. Ir. 111.

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Queen (*Lord Rossmore*) v. *The Irish Land Commission* (1). The first section therefore of the Act of 1881 does not help Lord Meath.

Further even if that section applied, its provisions have not been complied with. No notice of intention to sell was given to the landlords, and they had no opportunity of exercising their right of pre-emption. As they denied that the Countess of Meath was a tenant within section 1, they did not apply under sub-section 5 of that section to have the sale declared void. Section 19 of the Act of 1896, abolishing the necessity of notice to the landlord in certain cases is not retrospective and does not apply to the deed of the 26th October, 1895. Section 50 (1), relates only to matters of procedure and does not make sect. 19 applicable to an assignment completed before the Act.

Moreover the holdings here constitute a "home farm": *Hamilton* v. *Sharpe* (2), approving of the meaning given to those words in *Musgrave* v. *Hanley* (3). To be excluded from the operation of the Land Acts as a home farm, it is not necessary that a holding should be or form part of a home farm of the landlord; on the analogous question of demesne land, it has been decided that it is not necessary that the demesne should be the landlord's demesne: see *Magner* v. *Hawkes* (4); and though the law as to demesne lands is now regulated by section 5 of the Act of 1896, the case of home farms remains as before, and the principles of the decision in *Magner* v. *Hawkes* (4) apply.

Further, the lands are demesne and have been incorporated in a demesne by Lord Meath: Act of 1896, section 5 (1) (*b*) (ii) (iii): *Pratt* v. *Gormanston* (5), *More O'Ferrall* v. *Quirk* (6); and if any portion of either holding has been so incorporated the entire of that holding is excluded from the Acts: *Leonard* v. *St. Leger Barry* (7).

[*Cheevers* v. *Fallon* (8) and *Graydon* v. *Trustees of Morgan's Charity* (9) were also referred to.]

(1) [1894] 2 Ir. R. 394.
(2) 20 L. R. Ir. 224.
(3) MacDevitt's Land Cases, 333.
(4) 32 L. R. Ir. 285.
(5) [1894] 2 Ir. R. 279, 557.
(6) [1895] 2 Ir. R. 197.
(7) MacDevitt's Land Cases, 240.
(8) [1895] 2 Ir. R. 407.
(9) *Ibid.* 513.

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In these cases the landlords appealed from two orders of the County Court Judge of the County of Wicklow, dated, respectively, the 22nd April, 1896, fixing fair rents of two holdings, now in the occupation of Lord Meath, and of which he claims to be tenant. The grounds of appeal, stated in the notices of appeal, were, that the holding, in each case, is demesne land, and was let to the tenant, or his predecessor in title, to meet a temporary necessity of either, or of both, landlord and tenant, but, on the hearing before us, counsel for the landlords also contended that the holdings formed part of a home farm, and, further, that Lord Meath was not the tenant.

The two holdings adjoin, and, owing to the removal of portion of the original boundary fence between them, now form substantially a single holding lying to the west of part of the townland called on the Ordnance Map Kilruddery Demesne, West, in the county of Wicklow. By a lease dated the 7th June, 1865, made between Joseph Kavanagh, of the first part, Elizabeth Megan, of the second part, and the late William Earl of Meath, of the third part, the larger holding, consisting of part of the lands of Irishtown, containing 91A. 3R. 9P., statute measure, was demised to William Earl of Meath, for a term of eighteen years, from the 25th March, 1862, at the yearly rent of £212 10*s*. The lease contained a covenant and declaration, that if the said William Earl of Meath, his executors, administrators, or assigns, should, without the previous consent in writing, of Joseph Kavanagh, his heirs or assigns, sell, assign, alien, underlet, or in any manner, either as conacre, or otherwise, dispose of the demised premises, or any part thereof, or in any manner part with the possession of the same, or of any part thereof, or bequeath the same, by will, to more than one person, it should be lawful for the said Joseph Kavanagh, his heirs and assigns into the said demised premises, or any part thereof, to re-enter, and the same to have again, re-possess, hold, and enjoy, as in his or their former estate, and in all respects as if the term thereby created had expired by efflux of time.

By an agreement of equal date, made between the same parties, and endorsed on the lease, it was agreed that the said William Earl of Meath, should hold and enjoy other portion of

the lands of Irishtown, containing 6A. 1R. 36P., Irish plantation measure, equal to 10A. 2R., statute measure (being the smaller of the two holdings now before the Court), upon the same conditions, and for the same term, and subject to the same covenants in the lease mentioned in respect to the lands thereby demised, provided that the interest of the said Joseph Kavanagh should so long last, the said William Earl of Meath paying therefor the yearly rent of £24 5*s.* 6*d.* over and above the rent reserved by the lease.

The lease of the larger holding expired by effluxion of time, on the 25th March, 1880, and as William Earl of Meath remained in possession of the two holdings, paying the rents reserved by the lease and agreement, respectively, the tenure of each holding became a tenancy from year to year, subject to the provisions of the lease so far as they were applicable.

William Earl of Meath died on the 26th May, 1887, and thereupon the present Earl went into possession of the two holdings on the assumption (which afterwards proved to be erroneous) that the estate and interest of the late Earl had passed to him under certain deeds of settlement relating to the family estates.

In the month of August, 1894, Reginald Earl of Meath served two originating notices of applications to the County Court of the county of Wicklow, to fix fair rents of these two holdings, and on the 25th January, 1895, the applications were dismissed by the County Court Judge on the grounds the lands were demesne lands. Appeals from these decisions to this Court were then brought by Lord Meath, and on a careful review of the evidence given before us, we held that the lands were not demesne, but being of opinion on the documents submitted to us that the tenancies in these holdings had never become vested in the present Earl but had passed to Harriet Dowager Countess of Meath, under the codicil to the will of the late Earl, we by order dated the 17th May, 1895, affirmed the orders of the County Court Judge dismissing the originating notices.

By an indenture dated the 26th October, 1895, made between Harriet Dowager Countess of Meath of the one part, and Reginald Earl of Meath of the other part, after reciting *inter alia* that the interest of William Earl of Meath in these holdings passed on his death under the residuary clause in the codicil to his will, to the

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Dowager Countess of Meath, but that since the death of the said William Earl of Meath the said lands had been in the occupation of Reginald Earl of Meath and had been farmed by him, the said Dowager Countess of Meath and Reginald Earl of Meath having erroneously supposed and believed that the estate and interest of the said William Earl of Meath in the said lands passed on his death to Reginald Earl of Meath, under the deeds relating to the other estates of the said Earl of Meath; and reciting that Reginald Earl of Meath had expended a large sum of money in draining and fencing and other improvements on the said lands, and reciting that the Dowager Countess of Meath not desiring to farm the said lands had agreed to assign to the said Reginald Earl of Meath the said tenancies from year to year then subsisting in the said holdings and all claims to any improvements made thereon either before or since the death of the said William Earl of Meath, it was witnessed that the said Dowager Countess of Meath in pursuance of the said agreement and for a nominal consideration thereby assigned to the said Reginald Earl of Meath the said lands and hereditaments for the tenancies from year to year then subsisting therein, subject to the said yearly rents of £212 10*s.* and £24 5*s.* 6*d.* and to the covenants, conditions, and agreements to which the same were then respectively subject.

In the month of January, 1896, fresh originating notices of application to the Civil Bill Court of the county of Wicklow to fix fair rents of these holdings were served by Lord Meath, and on the hearing of these the orders now appealed from were made.

On the present hearing before us it was very properly agreed by the counsel for the parties, that the evidence given on the former appeals should be deemed to be repeated without the necessity of re-examining the witnesses, and that the shorthand-writer's notes of their evidence should be entered on the proceedings. The question of demesne land was so fully dealt with on the hearing of the former appeals that no useful purpose could be served by repeating now the reasons I then gave for holding that these lands were not demesne within the meaning of the Land Law Acts. The amendment in the law on this point by section 5, sub-section 1 (*b*) of the Land Act of 1896, does not affect the grounds of the

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former decision. No argument has been addressed to us in support of the objection raised by the notices of appeal that the holdings were let to meet a temporary necessity of both landlord and tenant or either of them, and there appears to be no ground for any such contention.

Counsel for the landlords, however, submit that these holdings form part of a home farm within the meaning of section 5, sub-section (1) (*b*) (i) of the recent Land Act, and reliance is placed on the evidence of Lord Meath given on the hearing of the former appeals. He described the lands in his hands immediately outside his park lands as the home farm, and in answer to a question as to whether he called the Irishtown lands (*i.e.* the holdings in these cases) part of his home farm, he stated that he worked them in with the home farm.

Lord Meath appears to farm extensively. His agent, Mr. Maurice C. Knight, stated in his evidence that he, on Lord Meath's behalf, farmed 702 acres in and about Kilrudderry, consisting of part of the lands of Kilruddery demesne, Irishtown, Ballywaltrim, Oldcourt, &c. These lands were used as an ordinary farm for Lord Meath's benefit; live stock to the value of £1412 was sold off the lands in one year; and hay, straw, oats, potatoes, carrots, and turnips, were also sold.

The present holdings were never any part of a home farm of the landlords in these cases, or their predecessors in title, and, so far as I am aware, a holding has never hitherto been excluded from the fair rent provisions of the Land Law Acts on the ground that it had been converted by the tenant into a home farm.

But assuming that land converted by a tenant into a home farm comes within the exclusion contained in section 5, sub-section (1) (*b*) (i) of the Land Act of 1896, which, however, I am at present by no means disposed to admit, I think that the landlords have failed to establish that these holdings are part of a home farm within the sense in which that term is used in the Land Acts. Taking the definition or description of home farm given in the order of the Court of Appeal in *Hamilton* v. *Sharpe* (1), it appears to me that the landlords have not made out that these

(1) 20 L. R. Ir. 224.

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holdings were used by Lord Meath for the convenience or advantage of his residence, and in connection therewith, and not merely as an ordinary farm to be used for the purpose of profit.

One other ground of objection, the alleged invalidity of the assignment to Lord Meath, still remains to be considered, and it involves some serious and difficult questions.

The lease of the 7th June, 1865, contained "an agreement restraining assignment" within the meaning of the 10th section of the Landlord & Tenant (Ireland) Act, 1860; and this applied to both the holdings, as the smaller holding was to be subject to the same conditions and covenants as those in the lease. This restraint on alienation also remained in force, when on the expiration of the lease on the 25th March, 1880, the tenure became a tenancy from year to year, subject to the provisions of the lease so far as they were applicable.

The first point raised on this branch of the case is, that the assignment of the 26th October, 1895, from the Dowager Countess of Meath to the present Earl is invalid, inasmuch as the prescribed notice under sect. 1, sub-sect. 2, of the Land Act of 1881 was not given to the landlords. By sect. 57 of that Act "sale," "sell," and cognate words in the Act are defined as including alienation and alienate, with or without valuable consideration; and it is argued that the only power of assignment possessed by the Dowager Countess of Meath was that given by sect. 1 of the Land Act of 1881, and that one of the conditions for the validity of such an assignment was service of the notice prescribed by sub-sect. (2) of that section. But sub-sect. (5) provides that if the tenant fails to give the landlord the notice or information required by the previous sub-sections the Court may, if it think fit, and that the just interests of the landlord so require, declare the sale to be void, and I have always been of opinion, and have held that compliance with the regulations of these sub-sections is not a condition precedent to the transfer of the interest in the tenancy. This appears also to be the view of the Vice-Chancellor, who in *Fisher* v. *Coan* (1) states at page 182:—"The section does not make even an actual sale of the tenancy void by reason of failure by the

(1) [1894] 1 I. R. 179.

tenant to give the landlord notice of his intention to sell, but renders it voidable by the Court, if it think fit, and that the just interests of the landlord so require." In the present case it would be difficult to contend that the just interests of the landlords require the assignment to Lord Meath to be declared void.

Another answer to this objection has also been put forward on behalf of the tenant. Sect. 19 of the Land Act of 1896 provides that "The alienation to one person only of a holding . . . otherwise than for consideration in money or money's worth, shall be a sale within the meaning of section one of the Land Law (Ireland) Act, 1881, but the provisions of the several regulations thereof other than regulation (6) shall not apply thereto." No notice of intention to alienate is necessary in such cases, nor has the Court any jurisdiction to declare any such alienation void. For the reasons already stated to-day in the case of *Fox* v. *Gloster* (1), I am of opinion that the provisions of sect. 19 of the recent Act apply to cases pending at the commencement of the Act, and as the assignment was plainly "an alienation otherwise than for consideration in money or money's worth," the objection grounded on the non-service of notice of intention to assign appears to be met also by this answer.

I come now to a more important and difficult point. Counsel for the landlords submit that owing to the restraint on alienation attached to the tenancies, the Dowager Countess of Meath's sole power of alienation without the consent of the landlords was founded on the provisions of sect. 1 of the Act of 1881, but that a tenant to whom a power of sale is given by that section must by virtue of the definition contained in section 57 of the Act be "a person *occupying land* under a contract of tenancy," and that as the Dowager Countess of Meath was not in occupation of the holdings at the time of the execution of the assignment or at any time, the deed has no validity in law.

It has not been contended that section 10 of the Landlord and Tenant (Ireland) Act, 1860, is confined in its operation to the currency of a lease and does not apply to a yearly tenancy arising on the expiration of a lease and subject to the provisions

(1) *Ante*, p. 35.

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of an agreement restraining or prohibiting alienation contained in the lease. It is argued, however, on the part of the tenant that by reason of the provisions of the Land Act of 1881, the restraint on alienation had ceased to exist when the assignment in question was executed, and further that the Dowager Countess of Meath was a tenant within the meaning of section 1 of the Act at the time of its execution. The case of *In re Wright and Tittle's Contract* (1), was referred to, but that case merely decides that where on the application of a lessee in occupation an order has been made under the joint operation of the Land Acts of 1887 and 1881, fixing the fair rent of a holding, the provisions of section 1 of the Act of 1881 apply, although the lease contains a covenant against alienation. It was there contended that a lessee who had had a fair rent so fixed could not sell his holding without the consent in writing of the lessor, even though he had served due notice of intention to sell on the landlord, and the latter had not within the prescribed time elected to purchase, and the Vice-Chancellor held that having regard to section 1 of the Act of 1881, the consent of the landlord to the sale was not necessary.

I cannot assent to the argument that the restraint on alienation to which the tenancies from year to year in these holdings arising after the expiration of the lease in March, 1880, were undoubtedly subject, dropped off in some way on the passing of the Land Act of 1881, or at some subsequent date. If, when the Act of 1881 came into operation, these holdings had been wholly sublet by the late Earl of Meath, he could not in my opinion have claimed to exercise any right of sale under section 1 of the Act. The benefits conferred on tenants by the Act as to free sale, fixity of tenure, fair rent, and land purchase are confined to occupying tenants, and the tenancies referred to in the Act, whether present or future, fixed or under judicial lease, are tenancies of persons in occupation of their holdings. Occupation is in fact the key-note of the Act in the provisions which it makes for tenants.

Sect. 1 of the Land Act, 1881, in many cases does not confer any power of sale on the tenant of a holding to which the Act applies,

(1) 29 L. R. Ir. 111.

but imposes limitations on his common law right of sale, in consideration of the great benefits which he receives from the provisions relating to fair rent and fixity of tenure. But in cases like the present, where a tenancy is subject to a restraint on alienation, and in a large class of cases where the holding is subject to the Ulster tenant-right custom it gives a right of sale that would not otherwise exist. This right, however, is not annexed to the holding, but given to the tenant in occupation of the holding. A tenant of a present tenancy to which the Act applies, in occupation of his holding, may apply from time to time to the Court to fix a fair rent of his holding under section 8 of the Act, but if the tenant is not in occupation, the right of having a fair rent fixed is suspended. The fact that a tenant was qualified when the Act of 1881 came into operation to apply to have a fair rent fixed, will not aid him, if he is not in occupation of his holding when his application is actually made, and in like manner if the Dowager Countess of Meath was not in occupation of the holdings in the present cases when the assignment of the 26th October, 1895, was executed, she or those deriving under her cannot, in my opinion, claim any benefits arising from the 1st section of the Act of 1881, on the ground that the late William Earl of Meath, on the passing of that Act and thenceforth until his death might have exercised the power of sale given by that section.

The right of Lord Meath, therefore, to sustain his application in these cases appears to me to depend on whether the Dowager Countess of Meath was or was not in occupation of these holdings at the time the assignment of the 26th October, 1895, was executed. This deed, as I have already stated, contains an express recital that since the death of William Earl of Meath, the lands had been in the occupation of the present Earl and had been farmed by him. Occupation implies a use and enjoyment in fact and not a mere legal right of possession. Owing to the erroneous supposition that these lands had passed to the present Earl under the deeds relating to the family estates, the Dowager Countess of Meath never entered in fact into occupation of these lands, and never intended to do so. The actual occupation and enjoyment for upwards of eight years prior to the assignment were in the present Earl, who is stated to have expended large sums in improvements on the holdings.

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If in the year 1894, while Lord Meath was so in occupation, applications to fix fair rents of the holdings had been made to the Court by the Dowager Countess of Meath, I think they should necessarily have been dismissed, on the ground that the tenant applying was not in occupation, and for similar reasons I am of opinion that the Dowager Countess of Meath cannot be treated as having been a tenant in occupation of these holdings when the assignment of the 26th October, 1895, was executed, and that as its validity depends on the exercise of the statutory power given by section 1 of the Land Act of 1881 by a tenant in occupation, it was ineffectual to transfer any interest in the holdings to Lord Meath.

The orders of the County Court Judge fixing fair rents must, therefore, be discharged, and the originating notices dismissed.

Solicitors for the tenant: *Hamilton and Craig.*
Solicitor for the landlords: *J. K. Toomey.*

D. M'C. M.

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CLEARY, TENANT; DALY, LANDLORD (1).

Landlord and tenant—Demesne land—Land Law (Ireland) Act, 1896, sect. 5, sub-sect. 1 (b) ii—Onus of proof.

The *onus* lies on the landlord not only of showing that a holding consists of land which, when first demised, was demesne, but also, under the Land Act of 1896, of proving that it was intended, when let, to be preserved as demesne, or resumed as demesne by the landlord.

THIS case was heard at Clonmel on the 19th November, 1896, and now appeared in the list for judgment.

Cherry, Q.C., for the tenant.

Cooper, for the landlord.

(1) Before BEWLEY, J., and FITZGERALD, Q.C., Commissioner.

The facts and question for decision are stated in the judgment of Bewley, J.

BEWLEY, J.:—

This was an appeal by the tenant from an order of the Civil Bill Court of the county of Tipperary, dated the 24th June, 1896, dismissing the tenant's originating notice of an application to fix a fair rent, on the ground that the holding was demesne land.

The holding, which contains 75 statute acres or thereabouts, forms part of the townland called Thomastown Demesne, in the barony of Clanwilliam and county of Tipperary, and is held under a tenancy from year to year, at a yearly rent of £70 12*s.* 4*d.*

The demesne lands of Thomastown appear to have originally comprised over 2000 statute acres. In the year 1837 they were the property of Lady Elisha Matthew, heiress of the Earl of Llandaff, and a map or survey prepared in that year by Messrs. Brassington & Gale, the well-known firm of surveyors and valuers, has been given in evidence. This map, taken in connexion with the parol evidence, would certainly lead to the conclusion that the holding before the Court was at one time part of the demesne.

But even in 1837 a very large portion of the demesne lands outside what is termed the Home Division on the map was in the hands of the tenants. Under the provisions of sect. 58, sub-sect. (2) of the Land Act of 1881, demesne land was excluded from the rent-fixing provisions of the Act, and questions frequently arose as to whether land originally demesne, which had come into the occupation of tenants, had been what was termed in popular language "undemesned." To undemesne there should be a clear intention to do so, evidenced by the terms of the contract of tenancy or the acts of the landlord, and the landlord should have a sufficient estate in the lands to enable him to deprive them of their demesne character.

The provisions of the Land Act of 1881 as to demesne lands have been repealed by the Act of 1896, and other provisions substituted by sect. 5, sub-sect. 1 (*b*), of the latter Act. These provisions, by virtue of sect. 50, sub-sect. (1), of the Act of 1896 apply to the present proceedings, and the *onus* therefore lies on the landlord to prove that the holding, in the language of sect. 5, sub-

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sect. (1) (*b*) (ii) of the recent Act substantially consists of "land which, when first demised, was demesne, and which the provisions of the contract of tenancy, or the circumstances of the case, show was intended to be preserved as demesne or resumed as demesne by the landlord."

The holding in this case is separated by a county road from the House Division or residential portion of Thomastown Demesne. The title to it of the present tenant is derived by marriage with a daughter of Wm. Green, a former tenant. The existing tenancy must have subsisted for at least half a century, and there is no evidence of the circumstances connected with its creation. Several old witnesses were examined on behalf of the tenant. Most of them state that William Green was in occupation of the holding when first they recollect it, and they all agree that the holding was never in the occupation of any person living in Thomastown mansion-house.

Neither the present landlords nor their predecessor, Lord Dunsandle, ever occupied the mansion-house or the Home Division of the demesne. The late Count de Jarnac lived there for many years.

Assuming that the holding in the present case, when first demised, was demesne, the landlords have failed wholly to establish that the provisions of the contract of tenancy, or the circumstances of the case, show that it was intended to be preserved as demesne, or resumed as demesne by the landlord.

The order of the Civil Bill Court must be discharged, and the case remitted, to proceed pursuant to the statutes.

Solicitor for the tenant: *C. Barry.*

Solicitor for the landlord: *J. O'Dwyer.*

T. H. M.

KANE *v.* BROWNRIGG.

(1896. No. 4244.)

Ex. Div.
1896.
Nov. 27.

Practice—Motion for final judgment on specially indorsed writ—R. S. C., Ir., 1891, *Ord. III., R.* 6 (*F*); *Ord. XIV., R.* 1—*Ejectment for overholding —Derivative title.*

The assignee of a landlord may obtain judgment upon motion, under Gen. Ord. XIV., R. 1, for possession of premises overheld, upon the expiration of the letting, where the writ is specially indorsed, pursuant to Gen. Ord. III., R. 6 (F).

MOTION for final judgment, under General Order XIV., Rule 1.

The writ of summons was specially indorsed under the provisions of General Order III., Rule 6 (F), as follows :—

"The plaintiff, as assignee of the interest of the Ulster Land, Building, and Investment Company, Limited, in the premises No. 50, Great George's-street, in the parish of St. George, in the county of the city of Dublin, which was assigned to her by the said Company by deed dated the 11th September, 1895, and made between the said Company of the first part, E. Bailey, liquidator of the said Company of the second part, and the plaintiff of the third part, claims possession of the said premises, which were by note in writing, dated the 24th August, 1893, let by the said Company to the defendant for the term of three years from the 1st September, 1893, which term has expired."

The application was grounded on an affidavit, wherein it was deposed that on the 1st September, 1896, the plaintiff demanded possession of the premises, which demand the defendant refused.

The application was originally made to Holmes, J., during the vacation; but having regard to the decision of *Casey* v. *Hellyer* (1) his Lordship adjourned the application for the full Court.

(1) 17 Q. B. D. 97.

Ex. Div. 1896. KANE v. BROWNRIGG.

Sugrue, for the plaintiff, referred to Gen. Ord. XIV., R. 1, and Gen. Ord. III., R. 6 (F), the case of *Casey* v. *Hellyer* (1), and the later case of *Beaufort* v. *Ledwith* (2), and submitted that an assignee of an original landlord's interest stood in the same position as the original landlord.

[*Blood* and *Herbert Wilson*, *amici curiæ*, stated that a similar point arose in the case of *Burges and Others* v. *M'Craith and Others* (3), wherein Mr. Justice Murphy, on the 13th February, 1894, made an order for final judgment, and that such order was, on the 1st March, 1894, affirmed by the Court of Appeal.]

The defendant did not appear on the motion.

THE LORD CHIEF BARON said that the relation of landlord and tenant existed between the plaintiff and the defendant, and that since the Landlord and Tenant Act, 1860, the term "landlord" included an assignee of the landlord's estate. The case of *Casey* v. *Hellyer* (1) was decided on the basis of the English forms, which were not applicable to the present case, and the Court should not be restricted by mere forms. The Court would follow the decision of the Court of Appeal in the case of *Burges and Others* v. *M'Craith and Others* (3), and give judgment for the plaintiff, with costs.

ANDREWS and MURPHY, JJ., concurred.

Solicitors for the plaintiff: *James Dunne & Co.*

J. P. B.

(1) 17 Q. B. D. 97. (2) [1894] 2 Ir. R. 16. (3) Ex. Div. 1894. No. 53.

THE QUEEN (LAMBE) *v.* JUSTICES OF ARMAGH (1).

Q. B. Div. 1896. Jan. 30, 31. Feb. 10.

Licensing law—License for sale of intoxicating liquors on and off the premises —Renewal—Certificate of Justices as to "the peaceable and orderly manner in which such house has been conducted in the past year" (17 & 18 Vict. c. 89, s. 11)—License lying dormant and unused during part of the preceding twelve months—Undertaking given by applicant not to use the license, or to use same in a limited manner only—Obligation to supply reasonable refreshment to all comers—Certiorari *to quash certificate of Justices given for the renewal of publican's license.*

D. & Co. held a license for the consumption of intoxicating liquors "on and off" certain premises in Monaghan-street, Newry, originally obtained by them in 1890, on an undertaking then given by them to the Justices at sessions that they would not use the premises so licensed as an ordinary public-house, or for the sale of intoxicants on the premises. This license was renewed from year to year without objection, the original undertaking being strictly carried out by D. & Co., the licensed premises being used for storage and for bottling in connexion with their main offices in another street, where they carried on the business of wholesale wine and spirit merchants. In August, 1895, they opened the premises in Monaghan-street, so licensed, as a branch office for the sale therefrom of wines and spirits to their customers.

At the Annual Sessions in September, 1895, when D. & Co. applied for a renewal of the license, Lambe, a publican, living in the same street, objected (on notice previously given) on the ground that the premises had not been used during the preceding twelve months for the sale of intoxicating liquors on the premises; that during the few weeks they had been open they had not been conducted in a peaceable and orderly manner, as D. & Co. had refused to supply refreshments to persons requiring the same, without just cause of refusal—this referring to an occasion when Lambe had sent two persons to purchase drink for consumption on the premises. There was no objection by the police. The Justices heard Lambe's objection, but granted the certificate. On motion to make absolute an order for a writ of *certiorari* to quash the certificate:—

Held, that any member of the community may come forward and object to the renewal of a publican's license; that *certiorari* lies to remove and quash as well an order of Justices granting such certificate as an order refusing same; that (following *Reg.* (*Cox*) v. *Recorder of Dublin*, 16 L. R. Ir. 424) such an undertaking not to use a publican's license, or to use same in a

(1) Before HOLMES, and GIBSON, JJ.

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limited manner, is ineffectual and void; that where premises licensed for the sale of intoxicating liquors have not been, in fact, conducted as a licensed house in the past year, it is not competent to the Justices to grant a certificate that they have been "conducted" in a "peaceable and orderly manner" in that period.

Per Holmes, J.: The proprietor of a public-house licensed for the sale of intoxicating liquor on or off the premises is under no legal obligation to supply reasonable refreshment to all comers, so that his refusal so to do would disqualify him from applying for a renewal of his certificate, such refusal being, however, a matter which it is open to the Justices to consider when called on to certify to the good character of the applicant.

CERTIORARI. Motion to make absolute a conditional order for a writ of *certiorari* directed to the Justices of the county Armagh, and to Messrs. Duncan, Allardyce, & Co., to quash an order of the said Justices, granting the application of Messrs. Duncan, Allardyce, & Co. for a certificate for the renewal of an excise license for the sale of intoxicating liquor by retail, on their premises, at 19, Monaghan-street, Newry, on the ground that the order of the Justices was without and in excess of jurisdiction, and that, the premises not having been used as licensed premises in the year last immediately preceding, it was not within the competence of the Justices to grant a certificate to the good character of the applicants, and to the peaceable and orderly conduct, by them, of such house. Messrs. Duncan, Allardyce, & Co., showed cause.

It appeared from the affidavits that Messrs. Duncan, Allardyce, & Co. were wholesale wine and spirit merchants, who carried on business in Hill-street, Newry, and who, about six years ago, purchased the premises, 19, Monaghan-street, from the representatives of D. Hoey, who had carried on a like business therein, and had held, in respect thereof, a retail as well as a wholesale license. Hoey's license had been allowed to lapse, and, Messrs. Duncan & Co., after purchasing these premises and the bonded stores in the rere, applied, in 1890, to the Justices for, and obtained, an ordinary retail license for the premises, this license being granted upon the assurance given by Duncan & Co. in Court to the Justices, that the license would only be used by the firm in connexion with their trade (as wine merchants), and in the same way as formerly used by Hoey, and that the premises would not be worked or used

as an ordinary public-house, or for sale of liquor for consumption on the premises. Duncan & Co. had acted in accordance with this undertaking, and had, until August, 1895, merely used the premises in Monaghan-street as wine cellars and stores, and for bottling, in connexion with their Hill-street establishment. About that date they opened, at 19, Monaghan-street, a shop, or branch office, for the sale of wines and spirits to their customers, direct therefrom, instead of taking all orders, as formerly, at their house in Hill-street.

At the annual licensing sessions, in September, 1895, when Messrs. Duncan & Co. applied for a renewal of the retail license for the premises in Monaghan-street, the present applicant, Lambe, a commission agent, and, as it would appear, owner of certain premises in Monaghan-street jointly with his mother who held a publican's license in respect thereof, objected, as a parishioner, to the renewal, on the grounds (as set out in a notice previously served by him), that the premises had not been occupied and used during the past twelve months for the sale of intoxicating liquors on the premises, save for a fortnight, or thereabouts; that, during such time as the premises were open for the sale of intoxicating liquors, they were not conducted in a peaceable and orderly manner, as Duncan & Co. had "refused to supply refreshment to persons requiring the same, without just cause of refusal"; and that, on account of such refusal, they were not entitled to a certificate of good character. This refusal referred to an instance where two men, sent by Lambe, demanded two bottles of beer and porter for consumption on the premises, and were refused. Lambe was aware of the undertaking given by Duncan & Co. in 1890.

The Justices heard the application and Lambe's objection. There was no complaint or opposition on the part of the police, and the necessary certificate was granted. Lambe obtained a conditional order for *certiorari* to quash this certificate and the order of the Justices granting same, and now moved to make the conditional order absolute.

Seymour Bushe, Q.C. (*Drumgoole*, with him), for the applicant:—

In granting a license for the sale of intoxicating liquors on and off the premises, it is not competent to Justices to require any

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such undertaking as was here given. Such an undertaking is illegal: *Reg.* v. *Wilkinson* (1); *Reg.* (*Cox*) v. *Recorder of Dublin* (2); and could not be enforced, legally, against the licensee, or against a transferee, who possibly might not be aware of the undertaking. The duty of the Justices is confined to granting a license for the purposes mentioned in the Act, and for no other. Therefore, in the present case, the undertaking must be treated as a nullity, and as the premises were not kept open, as a public-house, for the preceding twelve months, the Justices could not certify (as they purport to do), to "the peaceable and orderly manner in which such house had been *conducted* in the past year" (3). The house had not been conducted as a licensed house at all: *Griffiths* v. *Justices of Lancashire* (4), and *Reg.* (*Cox*) v. *Recorder of Dublin* (2). Further, the owner of licensed premises is bound to supply refreshment to all comers at reasonable times. The Justices were right in hearing Lambe's objection, there being no statutory restriction, such as exists in the case of certificates for a spirit grocer's license.

J. H. Campbell, Q.C., and *Hume*, for the respondents:—

The present applicant, a rival publican, had no *locus standi* to object to the renewal: *Reg.* v. *Justices of Middlesex* (5). The public have no right to intervene. The statute (27 & 28 Vict. c. 35, sect. 5, and see 35 & 36 Vict. c. 94, sect. 82) confers this right upon the officer of police. Read in the light of the earlier legislation on the same subject, it is evident that it was the intention of Parliament to confine the right of objection to renewal to the officer of police, and to confide to his care the protection of the public interests. In the case of new licenses, public advertisements are required, but none in the case of renewals; and the applicant need not be in attendance at the Court, unless he is required by the Justices or the police authorities so to attend for some special cause personal to himself (37 & 38 Vict. c. 69, s. 14). An objection to an application for a new license must be made by a Justice, churchwarden, or parishioner. Here, if the view submitted be not correct, the right of objection to a renewal is larger than the right of objection

(1) 10 L. T. (N. S.) 370.
(2) 16 L. R. Ir. 424.
(3) 17 & 18 Vict. c. 89, s. 11; cf. 35 & 36 Vict. c. 94, s. 82.
(4) 35 W. R. 732.
(5) 3 B. & Ad. 938.

to a new application, and is open to every member of the public. Whatever be the law as to owners of alehouses and inns in England, it has never been suggested that a proprietor of a licensed house in Ireland is bound to supply drink to all comers; refusal may be a ground for objecting to the publican's character: *Reg.* (*Delaney*) v. *Justices of Queen's Co.* (1), if the circumstances bear out a charge of misconduct; but such is not the case here, and whatever be the value of an undertaking such as that given by the respondents, still it would be strange if the Court that imposed such undertaking, were to take advantage of its observance to break the license. Further, *certiorari* should not issue to quash an order of Justices granting a certificate of this sort—a purely ministerial act, and one which should be left to the discretion of the licensing Justices: see *Re Dillon* (2).

Drumgoole, in reply.

Cur. adv. vult.

HOLMES, J.:—

Feb. 10.

The circumstances that have led to this application are remarkable, and as far as my experience goes, novel. Duncan, Allardyce, & Co. are a firm of wine and spirit merchants of old standing in Newry. About six years ago they purchased premises in Monaghan-street, in that town, which had been used by the previous proprietor for the same kind of business, and to which, in his hands, a publican's license had been attached. Before the purchase, however, this license had been allowed to lapse; and the purchasers applied at the annual licensing Quarter Sessions for a new license shortly after they obtained possession. This application was granted upon the terms that there should be no drink sold for consumption on the premises, and the license thus obtained has been since annually renewed. As a matter of fact, however, it was never acted on, for any purpose, until the month of August last year. Duncan, Allardyce, & Co., carried on their business in their old establishment, and they only used their new premises for storage and bottling. There was no office connected with them in which orders could be taken, and, if wine and spirits were sent from them direct to customers, I would infer from the affidavits that any dealings of this kind

(1) 20 L. R. Ir. 167. (2) 11 Ir. C. L. R. 232.

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were covered by the wholesale licenses which were obtained each year from the excise authorities. In August last, the firm, for the first time, began to sell in Monaghan-street. They did not, however, open a public-house there, and they have not sold hitherto, nor do they intend to sell hereafter, drink for consumption on the premises. The place has, in fact, been made a branch of their general business, and I presume wine and spirits are bought in it, and delivered from it, in any quantity that suits the customer. As long as the license was dormant, no objection was made to its annual renewal; but the recent change seems to have aroused hostility. Previous to the September Licensing Petty Sessions, a person named Lambe, who, if not himself a publican, is interested in a public-house in the neighbourhood, gave notice that he would oppose the granting of the certificate required for renewal; and when the matter came before the Justices he relied, by way of objection, upon the fact that for nearly six years no business of any kind had been carried on under the license, and that, even during the few weeks in which it had been partially acted on, the business done was not really that of a publican. The certificate was given in the usual form, notwithstanding this objection, and the present proceedings have been taken by Lambe for the purpose of having it quashed, upon the grounds that, in the circumstances stated, the Justices had no jurisdiction to issue it. The litigation, at first, might seem a little peculiar. On the one hand, there is a highly respectable firm of merchants striving to retain a license which they have never used, and do not intend to use in the way that is generally considered profitable. On the other hand, there is a publican objecting, on the ground that there has not been been established in his neighbourhood a rival public-house. No doubt, there is some reason for the litigation, but counsel on both sides touched very lightly on this aspect of the case, and the Court has been left to find out for itself the practical bearing of the question it is called on to decide.

A reference to the excise duties gives some assistance. Wholesale licenses for wine and spirits, which can be obtained from the excise authorities without any previous order or certificate, and the duty on which is ten pounds or ten guineas each, entitle the holder to sell wine and spirits in quantities not less than two

gallons. Licenses for the sale of wine to be consumed off the premises are obtainable on payment of the duty of two pounds ten shillings. It is obvious that these licenses alone would not be sufficient for a wine and spirit merchant carrying on his trade in the way usual in this country. Private customers who purchase brandy or whisky in bottles are as likely as not to require it in quantities under two gallons at a time. To meet this class of business, an additional license, charged with the duty of three guineas, is issued in England, enabling a dealer to retail spirits in quantities not less than a quart; but as far as I can learn there is no corresponding license in Ireland. The spirit grocer's license, so well known here, but not existing in England, is issued upon a Petty Sessions certificate, and upon payment of a comparatively high duty, to persons dealing in tea, cocoanuts, chocolate, or pepper, and authorizes the sale of spirits by retail in any quantity not exceeding two quarts. This, as far as I am aware, is the only license for consumption off the premises that would enable a spirit merchant to sell in small quantities; and even with it and a wholesale license combined, quantities between two gallons and half-a-gallon would still remain uncovered. A publican's license, on the other hand, authorises the sale of spirits, wine, beer—in fact, intoxicating liquors of every kind—to be consumed either on or off the premises, and there is, as far as I am aware, no restriction on the quantity that may be sold under it. If I am right in this last point, it would seem to follow that a wine and spirit merchant, carrying on the most extensive wholesale and retail trade, would require no other license. It will thus be seen that there is involved in the present case a question of general importance to spirit merchants and publicans. The former may say that such a license is necessary for the proper development of their business in all its branches. The latter may retort that their interests are prejudiced by spirit merchants being allowed to use a publican's license for a purpose for which it was never intended. Perhaps, however, there is a still stronger reason than mere commercial convenience for the holder of a semi-dormant license of this kind wishing to preserve it. The present state of the Irish licensing law, and the mode in which it is administered, have given an absurdly high value to public-

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houses; and a license capable of being made fully effective at any moment adds enormously to the worth of the premises to which it is attached. If Lambe succeeds in these proceedings, Duncan, Allardyce & Co. will not only be put to some inconvenience in their business, but they will also lose a valuable asset—an asset, however, which they have neither bought with their money, nor acquired by their industry, but which has been created by the combined operation of the law and the licensing Justices.

I have, perhaps, dwelt too long upon matters which cannot help the Court in coming to a decision; but I had for some time a difficulty in understanding why this firm should pay a substantial duty, and embark in expensive litigation for the sake of a license which seemed, from the statement of their counsel, to be of no practical use to them; and it is always unsatisfactory to decide an abstract question of law without knowing what concrete interests are dependent on it.

Preliminary to the main subject of controversy, there are one or two points relied on as cause against the conditional order. It is argued that Lambe had no *locus standi* to object at Petty Sessions, or to become relator in this Court; and it is further contended that the certificate of the Justices cannot, under any circumstances, be made the subject of a writ of *certiorari*. I agree with Mr. Campbell, that the right of a person to object to the granting of the certificate depends upon the statutory provisions that confer the jurisdiction on the Justices and regulate its exercise. But I fail to follow the argument based by him on other sections of the licensing code relating to a wholly different subject-matter. For example, referring to the provisions that require an applicant for a new license to give certain notices, and that authorise a Justice of the peace or inhabitant of the parish to object, he asks, is it possible that a wider right of objection would be given in the case of the certificate for renewal, the applicant for which is not required to give any notice? An argument of this kind does not deserve an answer. Its only effect on my mind is to make me distrust the case which it is employed to support. It is easy to give reasons in support of either a wide or narrow right of objection; but they would be of as little value on the one side as on the other. It depends upon what the Legislature has enacted in

the particular case, not upon what fine-drawn analogies or fanciful reasoning might lead us to think it ought to have enacted. The section which requires, as a condition for the renewal of a publican's license, the certificate of Justices presiding at Petty Sessions is the 11th section of 17 & 18 Vict. c. 89. This section in its opening sentence refers to a renewal at and for the same house as shall have been licensed in the year last immediately preceding; and the Justices are to certify to the good character of the person applying, and to the peaceable and orderly manner in which such house shall have been conducted in the past year. This was for twenty years the governing provision on the subject. It contains no reference to objectors, and it is obvious that the Justices were given the fullest discretion as to the means of acquiring the information to enable them to grant or withhold the certificate. It would, I presume, have been their duty to listen to anyone in Court who could depose to matters relevant and material; nor can I conceive how a question of *locus standi* could arise as to any person whom they were pleased to hear. The statute passed in the following year (18 & 19 Vict. c. 62), giving a right of appeal to a publican who has been refused his certificate, contemplates that the Justices should have some person before them to oppose the application, for it provides that the person so opposing is to be made respondent in the appeal; and as there is nothing to indicate who is the person entitled to oppose, and as no citizen has a greater interest than another in the character of a publican or the orderly conduct of his house, it seems to follow that any person may be *legitimus contradictor*. The 14th section of 37 & 38 Vict. c. 69, regulates the procedure when the certificate is applied for. The object is evidently to ensure that the magistrates shall act judicially, and with due regard to the requirements of justice. Accordingly, it provides that they shall not allow any objection to the signing of a certificate, or receive any evidence with respect thereto, unless a written notice of intention to oppose be served on the applicant within the time and in the form specified. These words seem to imply the same general right to object that previously existed; but Mr. Campbell says that they are governed by the previous clause, which provides that the publican need not attend in Court

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unless he is required by the Justices or police authority so to attend for some special cause personal to himself, which shows that an objection can only come from the Justices or the police. This seems to me to be not only a forced but an impossible construction. The word "Justices" occurs in each of the four provisions that compose the section. In the three last it must mean the Justices presiding at the annual licensing petty sessions—a body which first has a collective existence on the day the objection is to be heard. Must not "Justices" mean the same thing in the first clause? and if so, how is it possible for them to give notice seven days before? Besides, what could be more absurd than that the Justices, who are to decide upon evidence given on oath in open Court, should prepare themselves for their judicial duties by giving a written notice that they intend to oppose the application. The third clause shows what is meant in the first by the Justices requiring the applicant to attend in person. In fact, the procedure prescribed is reasonable and consistent throughout. The applicant is not obliged to attend unless required by the Court or the police; but he gets due notice of any objection, and he can judge for himself what steps he ought to take to meet it. Nor is there anything unreasonable in making the right to object so general. The persons interested in the peaceable and orderly conduct of a public-house are not confined to the police and neighbours, but include everyone who uses, or intends to use it, either habitually or casually; and there is nothing oppressive in allowing anyone who can inform the Court of either the personal character of the publican or the conduct of his business to do so after giving proper notice.

The right to oppose at the Licensing Sessions carries with it a *locus standi* to apply in this Court for a writ of *certiorari* if the Justices exceeded their jurisdiction. The cases referred to, in which it was held that a rival publican was not entitled to appeal, and that, possibly, he could not be a relator in the Queen's Bench Division, do not apply. Lambe is not before us as a rival publican—he served his objection, and was heard in the Court below. If the application had been refused, and the applicant had appealed, Lambe would have been respondent. He is a party to the litigation, and the fact of his being interested in another

public-house, although it may suggest a motive for his action, is no disqualification. I see no difference in law between a man who opposes a publican's certificate, because he is interested in a rival establishment, and the man whose opposition springs from his interest in the cause of teetotallism.

It is said the writ of *certiorari* does not lie, because the granting of the certificate is only a ministerial act; and *In re Dillon* (1) is relied on as an authority for this proposition. It was held in that case that the Act, 20 & 21 Vict. c. 43, s. 5, does not apply to these certificates, and excellent reasons are given for that decision; but it is no authority for saying, that the magistrates, in dealing with them, are not acting judicially, and if it were, I would not regard it in the face of the 14th section of the Act of 1874, that has since become law. Once there is jurisdiction to consider the application, the Justices have a complete discretion, which cannot be questioned in this Court; but certain conditions must exist to give them jurisdiction. For example, the house must have been licensed during the previous year, and the applicant must still be in possession of it. A certificate given where these conditions do not exist, would, in my opinon, be void, and can be quashed by means of the writ of *certiorari*.

It is argued, that there is another condition preliminary to the exercise of jurisdiction, namely, that the house must have been conducted as licensed premises during the past year, and this brings me to the main question in controversy. Can a house, for which licenses have been issued, covering a period of six years, but which has not been used for any of the purposes of licensed premises during the greater part of that period, and in which, even while the license was partially acted on, no drink was sold for consumption in the place itself, be the subject of a certificate at all? The foundation of Mr. Campbell's argument on this branch of the case is, that there is no legal duty on a publican to keep open his place of business all day or every day, and that he is entitled to limit his trading in any way that suits his interest or convenience, and that this does not amount to misconduct. I think this is a sound proposition, when properly understood. Two houses of entertainment are coeval with English

(1) 11 Ir. C. L. R. 232.

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literature—the inn and the alehouse. In the case of the former there was a common law obligation to supply reasonable accommodation to guests; but I can find no trace of this principle being applied to the latter. It is true that the first Irish Licensing Act (10 & 11 Charles 1, c. 5), provides, that the keeper of a licensed alehouse shall sell bread, ale, beer, and all other victuals and provisions for travellers and strangers, at reasonable rates, and shall keep two beds, at least, for those lodging; but this statute has been long repealed, and I have no reason for thinking that these provisions were, to any extent, declaratory of the common law. The business now carried on under a publican's license is, as I shall presently show, the development of the old alehouse; and, therefore, I am disposed to think that the modern publican is not subject to an obligation analogous to that of the innkeeper. But there is an essential difference between a business carried on at intervals, or subject to restrictions, and a business not carried on at all. Now, I am clearly of opinion that the licensing code assumes that licenses to be granted under it are to be used, and not to be allowed to lie dormant. Naish, L.C., points out in *The Queen* (*Cox*) v. *the Recorder of Dublin* (1), that the Justices are required, in the case of a new license, to consider the number of previously licensed public-houses in the neighbourhood, and he proceeds to show that this provision would be nugatory, if houses which are licensed were not used as such.

But I think it unnecessary to search the code for indications of its policy, when the provisions relating to the certificates with which this application is concerned, are absolutely conclusive. What are the Justices to certify? Is it not to the peaceable and orderly manner in which a licensed house has been conducted in the past year? Can these words apply to a house shut up and empty, or to a house only occupied as a private residence, or to a house used exclusively for carrying on a wholly different trade? To ask these questions is to answer them. In all business there may be cessations and interruptions, rebuilding or repairing the premises, death, illness, want of means, many other causes may keep up the shutters, and close the door for a time; but the trade is not abandoned. Christian, L.J., once remarked, that a barrister

(1) 16 L. R. Ir. 424.

may be said to be practising the law, or pursuing his profession, as well when travelling in Switzerland during his vacation, as when attending the Four Courts in Term time. But, what, if he were to sell his law-books, and establish himself as an hotel-keeper in Zermatt? He no longer pursues his profession, although he is still a titular barrister. In this case, Duncan, Allardyce, & Co., after they first obtained their license, neither did anything under it, nor proposed to do anything under it. It is possible that they had an intention of opening an office at some future time in Monaghan-street, but this intention was not evidenced by any overt act. In five successive years they obtained a certificate from the Justices, that the licensed premises were conducted in a peaceable and orderly manner, when, in point of fact, they were not conducted at all. I am of opinion that all these certificates were given without jurisdiction, and that the licenses issued in pursuance of them were absolutely void. If I am right in this, it would follow, that, even if the firm had begun to carry on the publican's business in the ordinary way in October, 1894, and continued to do so down to the last Licensing Sessions, the trading would have been illegal, and the Justices would have had no jurisdiction to grant them a certificate of renewal. I stated, in effect, the same proposition, in giving judgment in *The Queen* v. *Justices of Cork* (1), but I did not make it the ground of my decision; and, although not dissented from (except, perhaps, by Mr. Justice O'Brien), either here or in the Court of Appeal, it was not adopted by any of the Judges. I am, therefore, glad that I am not obliged to determine the present litigation by such an uncertain guide. I shall assume, not only that the license obtained in 1894 was a good one, but also that business similar to that begun in August last, was carried on under it from the date of its issue. On this assumption, has the house been conducted as licensed premises? I have used, several times, the expression, a publican's license. I am aware that the words do not occur in any statute, but it is a convenient description of the license prescribed by the 43rd sect. of the Inland Revenue Act, 1880, which authorises the sale of every kind of intoxicating drink for consumption on or off the premises. The origin of this license

(1) [1895] 2 Ir. R. 104.

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in the existing licensing code is to be found in the 13th and 14th sections of 6 George 4, c. 81, which, though considerably modified by subsequent legislation, are still unrepealed. The 13th section regulates the mode of obtaining a license for the sale of beer, cider, or perry—the English national drinks—by retail, to be drunk or consumed upon the house or premises of the person or persons applying for such license, and the licenses thus provided for are described as licenses to keep a common inn, alehouse, or victualling house. I need hardly point out the essential characteristic of these houses of entertainment—that the customers partake, on the spot, of the refreshments they require. An inn, or alehouse that does not welcome guests coming in to drink their beer and smoke their pipes in the bar or parlour, is an absurd anomaly, if it exists at all, and it was not, certainly, contemplated by the Parliament of 1825, which, when regulating the excise and licensing law, was influenced by no hostile feeling towards a universally prevalent feature of English life. Section 14 provides that no license for the sale of any spirits or foreign wine, by retail, to be drunk or consumed in the house where sold, shall be granted to any person who shall not have and produce a license under the previous section, and the 23rd section makes the continuance of the former license absolutely dependent upon the continuance of the latter. We thus see that the foundation of the modern public-house is the old inn or alehouse, and that the statute is careful to provide that its original character shall not be lost. Changes have been made in both the excise and licensing law since 1825; but I can find no alteration of the foregoing principle. It is carried out in a different way, but it is still preserved. Then there were two separate and distinct licenses. Now, under the Act of 1880, the alehouse license mentioned in the 13th section of the early Act can still be obtained alone, and there is, also, the spirit license, under section 43, already mentioned, to which a proviso is attached, that the holder of it shall not be required to take out any further or other license to enable him to sell beer or wine by retail.

These considerations convince me that a holder of this last-mentioned license, who has never carried on, and never intends to carry on, the business of wine or alehouse keeper, as it has

always been known or understood, is not entitled to receive the certificate prescribed by the 11th section of 17 & 18 Vict. c. 89. I fear, however, I have been wasting time in discussing the subject at such length, for in truth the matter is settled by an authority binding on this Court. *The Queen* v. *the Recorder of Dublin* (1) is precisely in point. There, Messrs. Russell & Co. had for many years, under a publican's license, carried on the business of family grocers, tea, wine and spirit merchants, in a house in Sackville-street, but they did not sell any liquor for consumption on the premises. In fact, they used the license in the same way as Duncan, Allardyce, & Co., have used it since August, and intend to use it in the future. Immediately before the Annual Licensing Sessions, Russell & Co. agreed to sell the premises, and transferred the license to Gerald Mooney, who intended to convert the place into a public-house. If the license was a valid, operative license, and the house had been conducted as licensed premises, *Clitheroe's Case* (2) would have applied, and so thought the Recorder and this Court. The case was brought to the Court of Appeal for the purpose of having the decision in *Clitheroe's Case* reviewed, and the Court, without expressing a final opinion on that point, held that, under the circumstances, Mooney must be regarded, not as a transferee, but as an applicant for a new license. The *ratio decidendi* of the Court, as far as I can gather it, applies to the case before us. There is no doubt of the view taken by Naish, L.C., and FitzGibbon, L.J.; and, although Morris, C.J., is less specific, I can see no other legal foundation for his judgment. With this authority to follow, it is unnecessary for me to refer to *The Queen* v. *Wilkinson* (3), an English decision to the same effect. It is stated in one of the affidavits filed for the purpose of this motion, that it is usual, in large towns in Ireland, and also it is believed in England also, for wine and spirit merchants to hold a publican's license, without carrying on the business of a publican. This statement surprised me. If such a practice exists in England, it shows a hardy disregard of *Queen* v. *Wilkinson* (3); but I have reason to know that, in any case, it does not prevail in Ireland. In Ireland, I believe there were some instances of it,

(1) 16 L. R. I. 424. (2) I. R. 11 C. L. 412. (3) 10 L. T. (N. S.) 370.

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previous to the decision of the Court of Appeal; but I think that most of them have disappeared, although there may be a few survivals in country places and the Dublin suburbs, and I have not been able to hear from the Inland Revenue Department of a single case in this city. Wine and spirit merchants carry on the most extensive and the most general businesses by means of the wholesale and spirit grocers' licenses; and what can be done here can be done in Newry. This, however, is no concern of ours. It is our duty to declare the law whatever be the consequence that follows from it; and, for the reasons I have stated, I am of opinion that the writ of *certiorari* ought to issue.

GIBSON, J.:—

It is the duty of the Court to pronounce its emphatic condemnation of the course taken by the licensing authority when the certificate was originally applied for and granted. The nature of the conditions imposed shows that the interests of the individual trader alone were considered, and not the requirements and convenience of the public. In exercising their discretion as to the grant of an "on" license, the Justices ought to consider the three statutory objections specified in sect. 4 of the Act 3 & 4 Wm. 4, c. 68. If they were at liberty to grant a license which was not to be used as an "on" license at all, they might disregard the statutory objections as inapplicable. The oral conditions are not inserted in the certificate, and could only be enforced, if at all, by the Justices at annual licensing petty sessions refusing to certify as to good character if the conditions were violated. The petty sessions or divisional magistrates might overlook terms to which they were no parties; or, even if such terms were brought to their attention, they might hold that infringement of them was not evidence of bad character. A man of excellent general character may repudiate an illegal and repugnant condition. If the conditions could be enforced against the original holder by the indirect means of refusing the annual certificate, no such remedy would exist against a transferee, who could in no way be bound. Contrary, therefore, to the original intention of the grantors of the license, a conditional dormant license might at any moment become alive and absolute, and the number of active

public-houses might thus be unnecessarily increased. How such colourable licenses are to be dealt with in reckoning the number of previously licensed houses, on the occasion of new applications, it is impossible to see. In my opinion, the course taken in granting the license originally was illegal and mischievous.

If the original license cannot now be questioned, was it effectually renewed and in force at the time when the application was made at the annual licensing petty sessions in 1895? Up to the year 1894 certificates were annually given. If the certificates were given without jurisdiction, where no licensed business at all was conducted on the premises, can the certificates be disregarded as null and void? or must they be treated as operative because they were not quashed? The judgment by FitzGibbon, L.J., in *Cox's Case* (1) supports the former view. However, for the purpose of this case, I shall assume, in the license-holder's favour, that there was a license in force in 1895, and that the only question is as to the jurisdiction of the Justices in 1895 on the facts before them relating to the conduct of the business in the past year.

I think that jurisdiction to give the certificate depends on the preliminary fact that licensed business was conducted on the premises. If the premises were shut up and deserted for the entire year, the certificate could not be given. The function of the Petty Sessions Court is limited by the statute, and cannot be enlarged by that Court misconstruing its duty and disregarding the facts: *Reg.* v. *King* (2).

In the present case it is said that part of a publican's business was carried on for a time—three weeks at all events—and that, as the license is only an authority and not an obligation to sell, the magistrates had jurisdiction to allow the certificate. Looking, however, at the substance of the case, and the undertaking given and acted on by the applicant, I do not think that the premises were conducted as licensed premises any more than the premises in *Cox's Case* (1). Whether a casual intermitting of business for part of a year from illness, death, or otherwise, would make a difference, is not before us. Here the license was given on the terms that consumption on the premises was not to be permitted.

(1) 16 L. R. Ir. 424. (2) 20 Q. B. Div. 436.

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The judgments of Lord Chancellor Naish and FitzGibbon, L.J., in *Cox's Case* (1) apply directly to the present facts.

It was next argued that the police alone could object; that no objection could be made save by virtue of express statutory authority, and that Lambe had no *locus standi* to object or to apply for *certiorari*.

Under section 4 of the Act of 1833 parishioners, as such, were authorised to object; constables, as such, were not. The certificate given by six householders was in their absolute discretion, and was not subject of objection or *certiorari*. By 6 & 7 Wm. 4, c. 38, s. 1, it was provided that the certificate of the chief constable or two overseers should be required on renewal, and by sects. 13 and 14 the number and functions of overseers were prescribed. The provisions of sections 9 and 10 of the Act 17 & 18 Vict. c. 89, give a *status* to the police which they did not possess under the Act of 1833, but these provisions do not affect parishioners' rights, and they do not apply to the certificate signed by the two Justices at Petty Sessions, under sect. 11. No conditions as to time of application, or as to notice by advertisement or otherwise are laid down, and it would seem as if the Justices were at liberty to hear anyone, and possibly even act on their own knowledge, just like the overseer or officer of police. Whether this is so or not, there is nothing to show that the right of objection was confined to the police, who are not referred to in the section at all. I think that anyone who could object under sect. 4 of the Act of 1833, could be heard under sect. 11. The police and overseers under the Act of 6 & 7 Wm. 4 enjoyed the same right.

The provisions of section 14 of the Act of 1874, which were in ease of the license-holder, do not rescind the pre-existing right of objection possessed by parishioners. The first paragraph exonerating the applicant from obligation to attend in person, unless required by police or Justices for personal reasons, is explained in *Sharp* v. *Wakefield* (2), (judgments of Lord Herschell and Lord Hannen), and *Daykin* v. *Parker* (3). The clause does not control the rest of the section, or limit any pre-existing right of objection.

(1) 16 L. R. Ir. 424. (2) [1891] A. C. 173. (3) [1894] 2 Q. B. at p. 558.

It was next contended that a rival publican had no *locus standi*. I have read the case of *Reg.* v. *Justices of Surrey* (1), relied upon as supporting this view. It does not decide the point, but the Court approved of *R.* v. *Middlesex* (2), where it was held that a neighbouring publican was not "a person aggrieved" by the grant of a new license within the appeal section of the English Licensing Act. The decision is quite inapplicable in this country. If a parishioner can object (as he can under our code), he does not lose the right because he is a publican.

It was suggested that though *certiorari* might be awarded in favour of a publican whose license was refused, it ought not to be allowed against a publican where it was granted. Where an objection, however, is legally made, and illegally disposed of, the jurisdiction of this Court equally attaches, whether the excess or defect by jurisdiction is brought to its notice by the publican, or by the objector.

It was, lastly, argued, that Lambe knew of and did not oppose the original license, and that his present motive for opposition was not, that Duncan's license was dormant, but that it was displaying recent indications of vitality. But this is not a case of mere irregularity, where the position of the license-holder has been altered. There has been a clear and continuous violation of the law, and the interests of the community require the decision of the Court. The police ought to have opposed, but did not. The discretion of the Court may, in some cases, be influenced by motive, but Lambe has done nothing to disqualify himself from opposing, and we cannot refuse *certiorari*, and thus perpetuate illegality.

In my opinion there was no jurisdiction upon the facts proved before the Justices to give the certificate, and the Court has no alternative but to quash it, and thereby finally extinguish this dummy license that never ought to have been granted.

Solicitor for Lambe: *J. Carroll.*
Solicitor for Duncan & Co.: *Hunter Moore.*

A. E. R. J.

(1) 52 J. P. 466. (2) 3 B. & Ad. 938.

Appeal.
1896.
May 14, 15.
June 25.

DUNBAR *v.* THE GUARDIANS OF THE POOR OF THE ARDEE UNION (1).

Negligence—Poor Law Guardians—Liability for negligence of official.—Fever patient in workhouse hospital—Death accelerated by want of proper care—Lord Campbell's Act.

Guardians of the poor are not answerable in damages in their corporate capacity for injuries caused by the negligence of their officials in the treatment of poor patients received into workhouse hospitals.

The plaintiff sued the Guardians of Ardee Union, under Lord Campbell's Act, for damages in respect of the negligence of the officials of the guardians by which the death of her son, a patient in the workhouse hospital, was accelerated, if not caused :—

Held, affirming the decision of the Exchequer Division, that the action did not lie against the guardians for the negligence of their officials.

APPEAL by the plaintiff from an order of the Exchequer Division, refusing to change the verdict entered in the action for the defendants into a verdict for the plaintiff. The action was brought, under Lord Campbell's Act, by Rose Dunbar against the Guardians of the Poor of Ardee Union, claiming damages for the death of her son, Patrick Dunbar, alleged to have been caused by the negligence of the guardians, and their servants.

By her statement of claim, the plaintiff alleged :—

1. "That the defendants are the Guardians of the Poor of Ardee Union.

2. "That the plaintiff is the mother, and one of the next of kin of Patrick Dunbar, deceased, and no administration has ever been taken out to his estate.

3. "That the defendants, as such guardians, had undertaken the duty of the care and management of an hospital for patients suffering from fever, which hospital was attached to the workhouse of the said Union.

4. "That it was the duty of the defendants, as such guardians, to provide for the maintenance and treatment in said hospital, of poor persons requiring medical and surgical aid, who were chargeable on the rates of said Union.

(1) Before LORD ASHBOURNE, C., and FITZGIBBON and WALKER, L.JJ.

5. "That the said Patrick Dunbar, being a poor person, and chargeable on the rates of the said Union, and then suffering from fever, was, in his lifetime, received as a patient into the said hospital, and thereupon it was the duty of the defendants to provide for his proper maintenance and treatment; but the defendants did not provide proper maintenance and treatment for the said Patrick Dunbar, but, on the contrary, with gross negligence, and wilfully, and in breach of the said duty, omitted to treat the said Patrick Dunbar properly, and allowed him to remain improperly attended to; and, after express notice had been given to the defendants and their servants of the condition of the said Patrick Dunbar, the said Patrick Dunbar, through the said gross negligence, jumped out of a window, and, while almost naked, and in a state of delirium, remained exposed to the cold for a considerable time, the result whereof was that he died within twelve months of the institution of this action.

6. "That, on the admission of the said Patrick Dunbar to said hospital, the medical officer examined him, and gave orders to the master of the workhouse, the servant of the defendants, to provide an additional attendant, in addition to the ordinary staff of the said hospital, to take special care of the said Patrick Dunbar. Thereupon it was the duty of the defendants to provide a fit and proper extra attendant; notwithstanding said order, in breach of said duty, with wilful negligence, and in gross disregard of their duty, the defendants did not provide such attendant, and though their attention was repeatedly called to the condition of delirium in which the said Patrick Dunbar was, they persistently refused to get such attendant, the result whereof was, that the said Patrick Dunbar suffered the injuries mentioned in paragraph 5 herein, and died within twelve months of the commencement of this action.

7. "That it was the duty of the defendants, as such guardians as aforesaid, to provide proper attendants and nurses in the said hospital; notwithstanding such duty, and in breach thereof, the said defendants wilfully and negligently neglected, and refused to appoint proper attendants and nurses, but knowingly appointed persons who were totally unfit for such a position, and, after knowledge of such unfitness being brought to their notice, the

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said defendants neglected to take measures to have proper attendants appointed, but wilfully and negligently allowed attendants and nurses who were totally unfit for their duties to continue on in the discharge of them, the result whereof was, that the said Patrick Dunbar received the injuries mentioned in the 5th paragraph herein, and died within twelve months of the institution of this action.

8. "That it was the duty of the defendants, in the carrying out of their ordinary duties, and of their duties in the management of said hospital, to take all proper precautions for the care of patients admitted thereto, and, in case any patient should escape, it was their duty to use all reasonable means to bring back said patient to the hospital. But the defendants did not use all, or any reasonable means to bring back said Patrick Dunbar, after his escape from the hospital, but, on the contrary, negligently, wilfully, and in breach of said duty, allowed the said Patrick Dunbar to remain exposed to the cold for a number of hours, almost naked, the result of which was, that the said Patrick Dunbar died within twelve months before the institution of this action.

9. "That it was the duty of the master of the workhouse, as such servant of the said defendants, when such notice was given to him of the condition of the said Patrick Dunbar, and that he had practically become insane, to send for the Medical Officer of the Union. But, notwithstanding that such notice was given, the said medical officer was not sent for, owing to the negligence and default of the defendants, the result thereof being that the said Patrick Dunbar remained without any or sufficient medical aid or remedies, and, consequently, became more delirious, and jumped out of the window of said hospital, and suffered the injuries in paragraph 5 herein mentioned, and died within twelve months of the commencement of this action.

10. "That the defendants undertook the care, and custody, and treatment of the said Patrick Dunbar, being then weak of mind and body, and suffering from fever, but the defendants did not take care of the said Patrick Dunbar, nor did they provide for his custody and treatment, but wilfully and negligently permitted him to leave their custody while almost naked and in delirium, to wander about the country, and exposed to the cold for

a number of hours, and wilfully neglected to take any measures to bring the said Patrick Dunbar back into their said care and said custody, and under their treatment, but allowed him to remain in the open air almost naked, the result of which exposure was, that the said Patrick Dunbar died within twelve months of the commencement of this action.

"The plaintiff, as mother of the said Patrick Dunbar, and one of his next of kin, for the benefit of herself and the other next of kin, according to the form of the statute in such case provided, claims £1000."

The defendants traversed the acts complained of in the statement of claim, denied that they acted negligently, wilfully, or in breach of duty, as alleged, denied that the notices mentioned in the 7th and 9th paragraphs of the statement of claim had been given to them; alleged that the injuries sustained by Patrick Dunbar were occasioned by his own negligence, and not by any neglect, default, or improper conduct on the part of the defendants; they also pleaded contributory negligence, and denied that the injuries sustained by the said Patrick Dunbar were caused by the alleged negligence, default, or improper conduct of the defendants.

The action was tried before Mr. Justice Gibson, and, by consent, without a jury. The facts proved before him are stated fully in the judgment of the Court of Appeal. At the conclusion of the evidence, the learned Judge held himself bound by the case of *Brennan* v. *Limerick Guardians* (1), to find for the defendants, but he reserved leave to the plaintiff to move to change the verdict, and he contingently assessed the damages at £100. Pursuant to the leave so reserved, the plaintiff applied to the Exchequer Division to change the verdict, but the Divisional Court also held themselves bound by *Brennan* v. *Limerick Guardians* (1), and refused to disturb the verdict. From that decision the present appeal was brought.

Meredith, Q.C., and *Dickie*, for the appellant:—

There was clearly negligence on the part of the defendants: the servants of the guardians had notice of the condition of the patient, and of his requiring additional attention, which they

(1) 2 L. R. Ir. 42.

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failed to give; on this ground *Brennan* v. *Limerick Guardians* (1) is distinguishable. There is evidence that the defendants' negligence was the cause of Dunbar's death; it is proved that it diminished his chance of recovery; after the patient escaped from the hospital the defendants and their servants were bound to make reasonable provision for his safety: *Foulkes* v. *Metropolitan District Railway Co.* (2).

No doubt the observations of FitzGerald, J., at the end of his judgment in *Brennan* v. *Limerick Guardians* (1), are against our contention, but those observations form no part of the judgment of the Court. The language of Bowen, L.J., in *Hickmore* v. *Guardians of St. George's in the East*, reported in Beven on Negligence (vol. i. p. 288) shows that the case in this aspect must be considered as open.

The master and porter are the servants of the guardians, who are liable for their negligence: *Mersey Docks Trustees* v. *Gibbs* (3); *Lovingston* v. *Guardians of Lurgan Union* (4): *Gilbert* v. *Corporation of Trinity House* (5); *Foreman* v. *Mayor of Canterbury* (6). The action is properly brought against the guardians themselves: 1 & 2 Vict. c. 56, s. 27; *M'Carthy* v. *Guardians of South Dublin Union* (7); *Hall* v. *Mayor of Botley* (8). No hardship on the ratepayers is caused by the guardians being made defendants, as the master has given them a bond for the due discharge of his duties, and, therefore, the ratepayers will lose nothing. Even if the ratepayers were to suffer, the answer is to be found in the consideration, that they elect the guardians, who are, therefore, their representatives, and it would be a great injustice that persons injured by negligence, for which the guardians were responsible, had no remedy: *Southampton and Itchin Bridge Co.* v. *Local Board of Health of Southampton* (9). The guardians have the appointment of their officers—such as the master and the porter—in their own hands: General Order, 18th December, 1882, Articles 24-27; Mooney's Irish Poor Law, p. 266. Their powers of dismissing such officers are prescribed by Article 29: *Ibid.* p. 269. The duties

(1) 2 L. R. Ir. 42.
(2) 5 C. P. D. 157.
(3) L. R. 1 H. L. 93.
(4) Ir. R. 2 C. L. 202.
(5) 17 Q. B. D. 795.
(6) L. R. 6 Q. B. 214.
(7) Ir. R. 2 C. L. 97.
(8) 47 L. J., Q. B. (N. S.) 138.
(9) 8 El. & Bl. 801.

of the master and porter are prescribed in the same General Order: *Ibid.* p. 297, and p. 301. From these provisions it is plain that the master and porter were completely under the control of the guardians. Though the appointment of the master must be sanctioned by the Commissioners, yet when once he is appointed, he is the servant of the guardians: *Mac Mahon* v. *Carroll* (reported in Brett's Grand Jury Law, see page 32).

It cannot be contended that the action does not lie as being against the Crown, for it is expressly contemplated by section 113 of 1 & 2 Vict., that such actions as this should be brought, provided the necessary notice is given.

The action is not against public policy: *Southampton and Itchin Bridge Co.* v. *Local Board of Health of Southampton* (1). To hold the guardians liable in this case will tend to secure better management of workhouses.

John Murray (with him *Macinerney, Q.C.*), for the respondents:—

No such action as the present lies against the guardians: except *Brennan's Case* (2) and *Hickmore's Case* (3), there is no record of such an action ever having been brought; and in both these cases the action failed. The decision in *Brennan's Case* (2) is exactly in point, and it has never been questioned. The guardians are a statutory corporation, with statutory duties to perform; no breach of any such statutory duty has been proved here. The guardians are subordinated to the Local Government Board, who make regulations under which the guardians are to act; no breach of any such regulation has been proved. The guardians discharged their entire duty, under the statute, towards the plaintiff's son, when they provided the hospital and staff. Their only duty in this respect was to select and appoint such staff of paid attendants as the Local Government Board, by their order, directed. [1 & 2 Vict. c. 56, ss. 2, 3, 27, 31, 32, 33, 41, 46, 47; 6 & 7 Vict. c. 92, s. 16; 25 & 26 Vict. c. 83, ss. 3 and 4; General Order of Local Government Board, 18th December, 1882.]

The action should be against the Local Government Board. The defendants are merely ministerial officers, and the maxim *respondeat superior* applies. When statutory powers are given to one body, and the power to carry them out assigned to another

(1) 8 El. & Bl. 801. (2) 2 L. R. Ir. 42. (3) Beven, vol. i., p. 288.

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body, no action lies against the latter for negligently carrying them out. In the present case the defendants could have been dissolved as a corporation, and paid officers appointed.

Even if this point is unsettled in England, *Brennan's Case* (1) has settled the law in this country. In America it has been decided that such an action does not lie.

The *Mersey Docks' Case* (2) is distinguishable, because there a duty was violated, which was imposed by the statute on the statutory corporation. Moreover, it was not the case of a charitable institution, but of one that made profit out of its dues. *Levingston* v. *Guardians of Lurgan Union* (3) was an action for trespass committed by the guardians, brought by a plaintiff who was otherwise a stranger.

Cur. adv. vult.

The judgment of the Court was delivered by—

June 25.

FITZ GIBBON, L. J. :—

This action has been brought by Rose Dunbar against the Guardians of the Poor of the Ardee Union, under Lord Campbell's Act, claiming damages for the death of her son, Patrick Dunbar, alleged to have been caused by the negligence of the defendants and their servants.

Patrick Dunbar was received as a patient into a workhouse hospital maintained by the defendants, and his death was undoubtedly accelerated, if not actually caused, by neglect to provide him, as a patient, with the care and attendance which he required. The neglect is charged, first, as neglect by the guardians of their own duty to provide proper attendants and nurses for the patients in the hospital; and, secondly, as neglect of this particular patient by officers of the workhouse, for which it is sought to hold the defendants responsible.

The action was heard by consent by Mr. Justice Gibson without a jury. He held himself bound by the decision of the Queen's Bench Division in *Brennan* v. *Guardians of Limerick Union* (1) to find for the defendants, but he reserved leave to the plaintiff to move to change the verdict, and he contingently assessed the damages at £100. By an oversight, which could, of course, be rectified, if necessary, he awarded £30 of this sum to the brothers and sisters of the deceased, giving £70 to the plaintiff. The

(1) 2 L. R. Ir. 42. (2) L. R. 1 H. L. 93. (3) Ir. R. 2 C. L. 202.

Exchequer Division, being also bound by *Brennan's Case* (1), upheld the verdict.

The facts were not in dispute, and are fully detailed in a minute of the Local Government Board, which has been received in evidence. Patrick Dunbar was admitted by the Union medical officer as a patient into the workhouse hospital at Ardee, on Saturday night, June 29, 1895, suffering from typhus fever. The hospital staff consisted of a nurse who had been there for six or seven years, and whom the doctor described as "moderately suitable" and "able for the case," with an old female pauper as an assistant. The master and a porter appear to have resided in the workhouse. On Monday, July 1, the doctor, anticipating delirium, directed the master to procure extra assistance, as was usual in such cases. The nurse told the master about midday on Monday that she would require extra assistance. None was given. About ten o'clock the same night the patient began to get violent, and the nurse sent her assistant to the porter to tell him to ask the master to send help at once. No assistance came. The patient got very violent, and got out of bed, threatening the two women with violence in his delirium. About 2.30 a.m. the nurse herself went and told the porter to tell the master to come at once. The porter brought back word that no assistance could be got until morning. Meanwhile the patient in delirium had assaulted the nurse and her assistant, and when they got to the door of the ward he escaped out of the window. The nurse again went to the porter, and told him to ask the master to send for the doctor, as the man had escaped. No one came. The nurse searched the grounds, but failed to find the patient. Ultimately, about 11 o'clock *next day*, he was brought back from a distance of more than a mile by the police, and died about forty-eight hours afterwards. Though his recovery was in any event doubtful, the chances being, as the Judge reports, "75 to 25 against recovery if there had been no negligence," there is clear evidence that the death was accelerated by the exposure, that the exposure extinguished the chance of recovery, and that the patient's escape and consequent exposure was due to the culpable negligence of the master and the porter, who were both dismissed in consequence.

(1) 2 L. R. Ir. 42.

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There is, however, no evidence of any default on the part of the guardians, either individually or as a body. The master and the porter appear to have held their offices for considerable periods, and no complaint against them had been made. The doctor said that the hospital staff was always found adequate. The master had authority to get additional assistance when required by the doctor, and had always on previous occasions acted on similar instructions, as the rules of the Local Government Board and the directions and authority of the guardians made it his duty to do. Dunbar was the only patient in the hospital at the time. There had been no typhus case for ten years previously. The guardians did not meet after the patient's admission until after his escape. The question really at issue is, whether guardians of the poor are answerable in damages in their corporate capacity for injuries caused by the negligence of Union officers in the treatment of poor patients received into workhouse hospitals. *Levingston* v. *Guardians of the Lurgan Union* (1), decided by the Exchequer Chamber in 1868, shows that guardians are answerable to third parties for the wrongful acts, and apparently also for the negligently injurious acts, of those acting under their orders or on their behalf. But we have to consider whether the same liability extends to injuries arising from the negligence of servants who have been properly employed by the guardians to discharge ministerial duties towards the recipients of relief under the Poor Law itself; in other words, towards persons accepting from the guardians, and under the Poor Law Code, the eleemosynary provision made for them. Upon this question there is a paucity of authority which is almost unaccountable if the liability exists.

The applicability to the Poor Law guardians of the principle of the decision in *The Mersey Docks Trustees* v. *Gibbs* (2) is really at issue. In every case the liability of a body created by statute must be determined upon a true interpretation of the statutes under which it is created. The statutes applicable to Poor Law guardians in the present matter are mainly two. The Irish Poor Relief Act, 1838 (1 & 2 Vict. c. 56), incorporates the board of guardians, enables them to enter into and execute all such contracts connected with the relief of the destitute poor, and with the purposes of the Act, as shall be enjoined or permitted by the Poor

(1) I. R. 2 C. L. 202. (2) L. R. 1 H. L. 93.

Law Commissioners (now the Local Government Board); and sect. 2 enacts that "such boards of guardians shall have power to govern and manage the workhouses of their respective unions, and to direct the officers of such unions in the execution of their duties, subject to the orders of the Commissioners." Under sect. 31 the Commissioners are empowered to define, specify, and direct the execution of the respective duties of such officers, and (sect. 33) by order, either upon or without any suggestion or complaint from the guardians, to remove any paid officer whom they shall deem unfit for, or incompetent to discharge, the duties of such office, or who shall at any time refuse or neglect to obey and carry into effect any orders of the Commissioners. The general result of these sections is to show that the ministerial work of poor law relief is entrusted to officers whose *status* is recognised as, to some degree, independent of the guardians, and who are rather parts of the system controlled by the Commissioners, than servants or agents of the guardians, discharging duties which primarily fall on the guardians themselves. The master of the workhouse is mentioned in sect. 43 in terms which imply that he is "the principal resident officer of the workhouse."

Under sect. 41, when the Commissioners have declared any workhouse fit for the reception of destitute poor, it is lawful for the guardians, at their discretion, but subject in all cases to the order of the Commissioners, to take order for relieving the destitute poor persons therein.

The workhouse hospital seems to have been established under the Irish Poor Law Amendment Act, 1843 (6 & 7 Vict. c. 92), of which sect. 16 provides that it shall be lawful for the guardians of any Union, if they shall think fit, subject to such regulations as the Poor Law Commissioners may from time to time prescribe, to provide relief for poor persons affected with fever or other dangerous contagious disease, in a house or houses hired or rented for the reception and medical treatment of such poor persons during their illness and convalescence, or by appropriating for that purpose such portion or portions of the union workhouses as the guardians, with the consent of the Poor Law Commissioners, shall consider it safe and convenient to be so applied, and to charge the expense so incurred on the rates of such Union. The supreme authority rests with the Commissioners here also, and

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their consent and their regulations are required to validate and direct any action taken by the guardians.

The statutes contain no express reference to any liability of the guardians, or of the Commissioners, to damages for the negligence of officers duly appointed in the discharge of their statutory duties, nor any express words which would include damages for negligence among the objects for which the rates might be applied. But *The Mersey Docks Trustees* v. *Gibbs* (1) appears to make these observations immaterial, if the liability exists otherwise. In the opinion of the Judges, delivered by Blackburn, J., in that case (p. 107), "In the absence of anything in the statutes (which create such corporations) showing a contrary intention in the Legislature, the true rule of construction is, that the Legislature intended that the liability of corporations thus *substituted for individuals* should, to the extent of their corporate funds, be co-extensive with that imposed by the general law on the owners of similar works. . . . On the same principle, they are at liberty to apply the fund to the discharge of the liabilities which, in the execution of the Act, by keeping open the docks and warehouses, they must from time to time incur to their customers." The cases where the Government is the principal, and the defendant merely the servant, and where a public officer, as a servant of the Government, has the manage- of some branch of the Government business, are mentioned as exceptions, in which such officers are not responsible for any negligence or default of those in the same employment as themselves. But the Judges repeat that "in every case the liability of a body created by statute must be determined upon a true interpretation of the statute under which it is created. And if the true interpretation of the statute is that a duty is cast upon the incorporated body, not only to make the works authorised, but also to take proper care and use reasonable skill that the works are such as the statute authorises, or" (as in *The Mersey Docks Case* (1)) "to take reasonable care that they are in a fit state for the use of the public who use them, there is nothing illogical or inconsiste[nt] in holding that those injured by the neglect of the statutable body to fulfil *the duty thus cast by the statute upon it*, may maintain an action against that body, and be indemnified out of the funds vested in it by the statute." The *ratio decidendi* against the

(1) L. R. 1 H. L. 93.

Mersey Docks trustees, therefore, was, that the effect of their statutes was not to confine the duty of the trustees to that of selecting proper officers, but that it was *their* duty to maintain the docks in a fit state, and that, as it was not the intention of the Legislature to deprive a shipowner paying dues to a wealthy trading company—such, for instance, as the St. Catherine's Dock Co.—of all recourse against it, and to substitute the personal liability of a harbour-master, the same effect could not be denied to the enactments relating to the Mersey Board without a *reductio ad absurdum.*

In adopting the opinion of the Judges, Lord Wensleydale recognizes the principle of those cases which have decided that when a person is acting as a public officer on behalf of the Government, and has the management of some branch of the Government business, he is not responsible for the neglect or misconduct of servants, though appointed by himself in the same business. He held the Mersey Docks trustees not to be on the same footing as occupiers of public buildings for Government purposes, but to be liable as mere private individuals, for he says, "It is difficult to say that they were acting on behalf of the public, for the public benefit, and therefore were irresponsible for the neglect and default of their servants, by whom alone they could act." The decision, therefore, does not contain anything to guide us to a conclusion that its principle extends to public bodies constituted as the Poor Law guardians are, and still less that it could extend to the Poor Law Commissioners.

The plaintiff's counsel relied strongly on *Gilbert* v. *The Corporation of Trinity House* (1), where the defendants were held liable for injury caused by negligence in leaving part of a beacon, which was vested in them, and which they had licensed a third party to remove, in a place where it damaged the plaintiff's ship. That decision seems to me to have rested on the position that the beacon was vested in the defendants, that they had a statutory right to remove it, and that when, instead of removing it themselves, they gave permission to a third person to do so, and he, in place of removing it properly, left the obstruction which did

(1) 17 Q. B. D. 795.

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the mischief, they could not get rid of their liability. It was also held that there was nothing in the history or constitution of the Trinity House to put it on the same footing as a great officer or a great department of the State. On the contrary, it was shown to be only a development of private institutions, and it was held liable, like any other body, for its own negligence, or for the negligence of its servants. But the Judges certainly seem to have thought that any exemption possessed by great officers of State, and the like, arose from their representing the Crown, being "emanations from the Crown," or "delegations by the Crown of its own authority." I cannot think that the exception is confined to cases involving the privilege or prerogative of the Crown. The reasons for it would, more or less, apply to every public department. But Day, J., broadly says:—"The law is plain, that whosoever undertakes the performance of, or is bound to perform, duties, whether they are duties imposed by reason of the possession of property, or *by the assumption of an office*, or however they may arise, is liable for injuries caused by his negligent discharge of those duties. It matters not whether he makes money or a profit by means of his discharging the duties, or whether it be a corporation or an individual *who has undertaken to discharge them.* It is also *immaterial whether the person is guilty of negligence by himself or by his servants*, if he elects to perform the duties by his servants, *if in the nature of things* he is obliged to perform the duties by employing servants, he is responsible for their acts in the same way that he is responsible for his own." This language is so wide that it must be cautiously applied, with due regard to the fact that it was used in a case in which the Court had to deal with the Trinity House only. Taken literally, this *dictum* would include such bodies as Poor Law guardians; but besides the Irish authority of *Brennan* v. *Limerick Guardians* (1), we have the observations of Lord Justice Bowen in the unreported case of *Hickmore* v. *The Guardians of St. George's-in-the-East*, noted in Beven on Negligence, vol. i., p. 290, to show that he considered the question of their liability for negligence on the part of their servants, in a case very like the present one, as so abstruse as not

(1) 2 L. R. Ir. 42.

likely to stop at the Court of Appeal in England, if decided in favour of the plaintiff. Accordingly, we are brought back to *Brennan's Case* (1), and must now determine whether it is right or wrong.

The judgment of the Court, delivered by FitzGerald, J., gives, first, the reasons in which the whole Court concurred, which must be distinguished from the other and wider grounds stated at the end of the judgment, on which the learned Judge himself formed the impression that the action was not maintainable. So far as he refers to the Poor Law Commissioners, and to their power over every board of guardians, the observation has a double application. In the first place, this is used as an argument to show that the guardians had done all that it was their duty to do ; and, secondly, that the guardians, as being a subordinate administrative body, either could not be liable for the negligence of inferior officers, or could only be liable if the Commissioners were so too. In either aspect the argument must apply here. For the Local Government Board had made, or sanctioned, regulations under which adequate care might, and ought to have been taken of Patrick Dunbar, by the master of the workhouse, and the guardians had done their own duty in providing the hospital and staff, and enabling the master to give or provide all necessary assistance when required by the doctor.

The Court decided, in effect, that the guardians were not liable because they had done their own duty, and were not liable for the neglect of the executive or ministerial officers of their own appointment. The decision was supported by the remark, that no such action had been instituted in this country against the guardians of any Poor Law Union, as such, during the forty years (now extended to fifty-eight), for which the Poor Laws have been in operation, nor had such an action, up to that time, been maintained in England. The Court gathered, from the Poor Law Statutes, that, although the guardians are a corporation to take order for the relief of the destitute poor, they are subordinated to the Poor Law Commissioners, that the maintenance of the workhouse hospitals forms part of the general relief of the destitute

(1) 2 L. R. Ir. 42.

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poor; "that the duty of the defendants was not to provide proper attendance to watch over the plaintiff's son, but that their duty was to select and appoint such a staff of paid attendants as the Commissioners should by their order warrant and direct." "There was no privity and no relation between the plaintiff's son and the guardians, save under the statutes. He sought admission into the workhouse hospital, and the guardians, in their discretion, admitted him. Their duty was to take order for the relief of the poor, according to the orders, general or special, of the Poor Law Commissioners." "The action might as properly be brought against the Commissioners as against the guardians." These arguments have now gained additional force by time, for, except Hickmore's action, which failed on other grounds, and this action, there has been no attempt to establish the liability of the guardians since 1878. Lord Fitz Gerald's own impression, that the action was not maintainable, rested on the wider ground that other remedies are available for neglect of their duty by guardians: that it would seem to be against public policy to permit actions to be maintained against them in their corporate capacity for negligent omission in carrying out their administrative duties, especially as the damages and costs should be paid, if at all, out of the rates. "If the present action can be maintained," he asks, "why should not an action lie against the guardians at suit of each pauper for every supposed neglect of administrative duty, causing to the individual any real or fancied grievance, *e.g.* for supplying food insufficient in quantity or inferior in quality, or insufficient or inferior clothing or bedding, defective sanitary arrangements, or any other of the various neglects or omissions by which inmates of a workhouse may be prejudicially affected? If the real or supposed omissions of guardians are to be thus redressed, it would be difficult, if not impracticable, to administer the law for relief of the destitute poor."

That judgment was delivered eighteen years ago. According to Mr. Beven, the point may be taken to be at present an unsettled one in English Law, and American authority is against the alleged liability. Under these circumstances, I think we should adopt the decision in *Brennan's Case* (1).

(1) 2 L. R. Ir. 42.

For myself, it appears to me that, according to reason, and the common understanding of ordinary people, there is a clear distinction between the relations to customers, or to the public, of such companies as the Mersey Docks Board and the Trinity House, and those of Poor Law guardians to persons received for relief into a public hospital, which is really a charitable institution. The case suggests the question—Whether the founders or governors of every charitable or voluntary institution are liable to indemnify patients, coming to them for gratuitous relief, against the consequences of any neglect or default of the nurses or officers whom the governors have, in their benevolence, engaged to attend the poor? If not, it is hard to hold the guardians liable. It appears to me, in the first place, that the guardians are, themselves, but members, not even the supreme members, of the department to which the negligent subordinates also belong. Again, the duty of the guardians, under the statute, is limited to providing the means of relief, and proper persons to administer it, and, I think, the idea would never occur to anyone entering a workhouse hospital, that the guardians were further liable to insure the recipient of relief against negligence on the part of the persons employed to give it. Such persons would be liable for their own acts or defaults, but I cannot hold that those personal acts or defaults of the subordinates are, in law, the acts of the guardians, nor are they acts which the guardians either could do themselves, or assumed the responsibility of doing through their servants. In short, the part of the machinery of relief which failed in its duty was not either the guardians, or so far under the orders or control of the guardians, or doing the work of the guardians, as to make its work their work, or the actors their servants acting for them. I think that *respondeat superior* does not apply, and that the guardians are not answerable, in damages, for any injury caused by the neglect or default of the master in the discharge of what were his duties under the statutes and regulations affecting his office. A bond for the due discharge of his duties, taken by the guardians on his appointment, has been given in evidence, but I do not see that it can impose, or imply, any liability for the benefit of third parties. It is required to secure the guardians against direct loss through the officer's acts or defaults.

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I do not reach this conclusion without difficulty, because the plaintiff has suffered a wrong for which many another defendant no more blameworthy than the guardians has to answer for the neglect of others, and there is no more inherent injustice in charging the rates with compensation for this injury than there was in making them liable in *Levingston's Case* (1). I am also impressed with the language of the Judges in the *Trinity House Case* (2), but for the reasons I have given, I must abide by the decision in *Brennan's Case* (3), and leave it to the Legislature, or to the House of Lords, to make or pronounce a rule, which, if made, would have the effect of insuring, at the cost of the rates, the efficiency of every subordinate who has to deal with those who seek relief under the Poor Law.

Solicitor for the plaintiff: *Dickie.*
Solicitor for defendants: *Caraher.*

G. Y. D.

Q. B. Div. 1895. Nov. 18, 19, 29. *Appeal.* 1896. Jan. 15, 16. Feb. 28.

CAREY *v.* HARPER (4).

Arranging debtor—Certificate of conformity—Bill of exchange—Principal and surety—Indemnity—Indorsee for value—Principal debtor carrying an arrangement—Payment of dividend on bill of exchange in the arrangement—Payment of balance by surety—Liability of principal after arrangement.

C., who was indebted to H. in an unascertained sum, accepted a bill for £64 drawn by H. H. negotiated the bill with the bank. Subsequently the amount due by C. to H. was ascertained and discharged by C., and H. thereupon undertook to indemnify C. against all liability on the bill. H. carried an arrangement with his creditors, paying 4*s.* in the pound, and ultimately obtained his certificate of conformity. The bank proved in this arrangement for their debt, and received the dividend, but C. had no notice of the arrangement proceedings. The bank then sued C. on his acceptance for the balance

(1) I. R. 2 C. L. 202.
(2) 17 Q. B. D. 795.
(4) 2 L. R. Ir. 42.

(4) Before JOHNSON, HOLMES, and GIBSON, JJ.

due on the bill, giving him credit for the dividend received from the arrangement. C. paid the amount sued for and the costs, and brought this action to recover the amount so paid from H. on his indemnity:—

Held, by the Queen's Bench Division (*diss.* Gibson, J.), that the plaintiff not having had notice of the arrangement proceedings, was entitled to recover, notwithstanding that the defendant had obtained his certificate.

Held, by the Court of Appeal (reversing the Queen's Bench Division), that the plaintiff was not entitled to recover.

NEW TRIAL MOTION.

Prior to the year 1889 the plaintiff had become indebted to the defendant in an unascertained sum for goods sold. Early in January, 1889, the amount of the plaintiff's indebtedness being then in dispute, the plaintiff, at the defendant's request, gave him his acceptance on a blank bill stamp, which the defendant filled up, as drawer, on January 5, 1889, for the sum of £64 14*s.* 10*d.* The bill was a four months' bill, and accordingly would have become payable on May 8, 1889. The defendant negotiated the bill for his own use with the Northern Banking Co. on January 7. On the 25th of the same month the plaintiff and defendant settled the account between them, and ascertained the balance, which the plaintiff paid in part by cash and in part by a bill (which he met at maturity), and the defendant undertook to indemnify the plaintiff against all liability on the bill of January 5, which the plaintiff had accepted and the defendant had negotiated as above mentioned.

Subsequently, on March 3, 1889, the defendant presented a petition for an arrangement with his creditors in the Belfast Local Bankruptcy Court. The Northern Banking Co., as holders of the bill of January 5, proved for their debt in the proceedings, and received a dividend of four shillings in the pound. On May 11, 1891, the defendant obtained his certificate of conformity, under the 64th section of the Bankruptcy Act of 1872. The plaintiff had no notice of the arrangement proceedings.

The bill having reached maturity, and not having been paid in full, the bank sued Carey on his acceptance, giving him credit for the dividend received from the arrangement matter, and Carey had to pay the bank for debt and costs £85. Carey then sued Harper in the present action for this amount. Harper

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pleaded his certificate of conformity obtained in the arrangement proceedings and the payment of the dividend to the bank. The defence also raised certain issues of fraud not material for this report, and at the trial, on the jury finding these issues in favour of the plaintiff, the Lord Chief Baron, holding that the plaintiff's demand was not barred by the certificate, directed a verdict for the plaintiff.

The defendant, on the ground that this was a misdirection, applied to the Queen's Bench Division that the verdict should be entered for him.

O'Shaughnessy, Q.C., and *Hume*, for the defendant.

Gordon, Q.C., and *Bartley*, for the plaintiff.

Cur. adv. vult.

Nov. 29.

GIBSON, J. :—

The questions argued before us were : Had the plaintiff a proveable demand? and was the certificate conclusive proof that the plaintiff was bound by notice of the arrangement? A further point arose in reference to the doctrine of double proof, the bill-holder having proved, and got a dividend, the benefit of which the plaintiff is entitled to receive, and has received. I propose to consider, briefly, four points. 1. Had the plaintiff a proveable debt? 2. Was he a creditor within the arrangement sections? 3. What was the effect of the creditor's proof? 4. If the plaintiff was a creditor entitled to notice, is the certificate conclusive? if not, what result follows from the fact that no such notice was given?

1. Had the plaintiff a proveable debt? The plaintiff accepted a bill drawn by the defendant, and, by subsequent agreement, the defendant undertook to indemnify the plaintiff in respect of this acceptance, thus converting it into a kind of accommodation acceptance. The result was that, as between drawer and acceptor, the latter became surety, or liable for the defendant's debt on the bill. It is now well settled, that the relation of principal and surety may be contracted by arrangement between parties liable without any consent of the creditor, and that such creditor, when aware

of such relation, cannot disregard it: *Rouse* v. *Bradford Banking Co.* (1)

The case was argued principally with reference to section 258 of the Act of 1857, dealing with contingent liabilities, and section 47 of the Act of 1872, with reference to contracts of indemnity. The decisions on those sections are not all easy to understand or explain. Most were adverse to the bankrupt, the Court acting on the principle that the creditor's common law remedy ought not to be taken away without clear and conclusive language. The strongest of the few decisions in the bankrupt's favour on the former section are *Ex parte Barwis* (2), and *Adkins* v. *Farrington* (3); while the language of Lord Selborne, in *Hardy* v. *Fothergill* (4), is a valuable commentary on section 47 of the latter Act, which expressly uses the word "indemnify"—a consideration overlooked in some cases. The decision in *Wiseman's Case* (5) was probably right, as the contingency there was complex and difficult to estimate; but it cannot be considered as an authority eliminating the word "indemnify" from section 47.

Without pronouncing any opinion on the precise range and operation of these sections, I think the present case is one falling within section 253 of the Act of 1857, and that the plaintiff, if not a surety, was a person liable for the defendant's debt. This was expressly determined in *Filby* v. *Lawford* (6), a case nearly identical with the present. *Wood* v. *Dodgson* (7), *Westcott* v. *Hodges* (8), *Stedman* v. *Martinnant* (9), are to the same effect. Whether the suretyship is the result of implied contract, as where the acceptance is originally for accommodation, or proceeds on express contemporaneous or subsequent contract, makes, as the cases show, no difference.

Section 253 is based on subrogation. It is practically the same as 49 Geo. 3, c. 121, s. 8. Before that statute, a surety who had not paid before bankruptcy, could only compel the creditor to prove for his benefit: *Ex parte Rushforth* (10). That enactment

(1) [1894] A. C. 586.
(2) 6 De G. M. & G. 762.
(3) 5 H. & N. 586.
(4) 13 App. Cas. 359.
(5) L. R. 7 Ch. App. 35.
(6) 3 M. & G. 468.
(7) 2 M. & S. 195.
(8) 5 B. & Ald. 12.
(9) 13 East. 427.
(10) 10 Ves. 409.

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enabled the surety, who paid after bankruptcy, to have the benefit of the creditor's proof, or, if the creditor had not proved, to lodge an independent proof. His right depended on payment, and, till payment, he could not prove.

The answer to the first question seems to be, that the plaintiff would have, under section 253, a proveable debt on payment, but not before.

It has been decided that a surety could not, by delaying payment, prejudice the position of the bankrupt, and that a bankrupt who obtained his certificate was protected against the demand of a surety founded on subsequent payment of a debt due before bankruptcy: *Jackson* v. *Magee* (1), *Westcott* v. *Hodges* (2). This is said to be based on the theory that assets may at any time come in, that it is never too late to prove, and that there may be proof after certificate: Griffith and Holmes, p. 563. I am only aware of one decided case of proof after certificate. The theory, if correct, hardly meets a case of arrangement. The surety was so far identified with the creditor's proof that where he had been compelled to pay the creditor interest as well as principal, he was not allowed to go beyond the proof and claim such interest: *Ex parte Houston* (3); nor could accessorial damage be proved for: *Van Sandau* v. *Corsbie* (4).

2. Was the plaintiff, at the time of the arrangement, a "creditor" within the meaning of the arrangement sections? Under section 253 he could not prove without payment; and that payment is essential to proof is stated in every text book. Under no conceivable circumstances could he prove in competition with the bill-holder, who must be paid twenty shillings in the pound before the surety could receive anything. I think that, in our Act, the term ought to be interpreted as including all persons possessing, *at the time of bankruptcy or arrangement*, a then proveable claim. The surety's rights are defined by section 253, and are not governed by section 258, or section 47 of the Act of 1872. Before payment, I am not quite certain that a surety could be a creditor under section 253. If a person had a contingent claim, capable of being valued and proved under the other sections,

(1) 3 Q. B. 48.
(2) 5 B. & Ald. 12.
(3) 2 Gl. & Jam. 36.
(4) 3 B. & Ald. 13.

he might be a creditor under such sections in respect of such claim. Such a person can prove, on valuing his claim, without more. He is quite in a different position from a surety, whose right of proof is not ascertained at bankruptcy, but entirely depends on the action of the creditor and the independent future contingency of payment. In the case of an ordinary bill, there might be a long series of persons liable, intervening between the acceptor and the holder. All of these parties would, according to the authorities, come within section 253. Would it be necessary for the arranging debtor to specify them in his statement as creditors? The matter is one of some difficulty. If they pay, they certainly are creditors; but, until they pay, they do not bring themselves within section 253; if they were named in the statement they could neither prove nor vote. A person who can neither prove nor vote is certainly not in any ordinary intelligible sense a creditor, though he possibly may be, in some metaphysical sense, for bankruptcy purposes.

3. The next question is, the effect of the holder's proof. If the surety is not a creditor before payment, can he be bound by the holder's action in proving?

The bill-holder himself is clearly bound by his proof and acceptance of dividend, and could not, even before certificate, sue the bankrupt for the debt so proved: *Elder* v. *Beaumont* (1). There is no doubt that the holder, becoming party to an arrangement and accepting a dividend, is also bound before certificate. If, under the old law, the surety had compelled the creditor to prove in bankruptcy as trustee for him, the surety must have equally been barred by the trustee's proof from seeking a remedy outside the bankruptcy. Where the surety does not pay the bill, and the creditor proves, but not at the surety's request, does that proof exhaust the surety's right and remedy? and is the surety's acceptance of the dividend equivalent to a previous request?

In bankruptcy, it is clear that there could be no double proof. Where an estate is insolvent it cannot be required to pay two or more dividends in respect of the same debt: *Re Oriental Commercial Bank* (2); and, until the principal creditor is paid in full,

(1) 8 E. & B. 353. (2) L. R. 7 Ch. App. 99.

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the surety is not entitled to prove for anything: *Ex parte Turquand* (1). On payment to the creditor he is entitled to stand in the creditor's place, and be paid all dividends accrued or to be received under his proof. The bill-holder represents the debt, and it is said that proof by him concludes any other party to the bill. "Proof by any of the parties to a bill is a bar to an action against the bankrupt by any other party who may have taken it up afterwards": Griffith and Holmes, p. 607. Accordingly, where an indorsee proved against a bankrupt acceptor, and the drawer afterwards paid, and, suing the acceptor, arrested him—it was held that the drawer, who was liable for the debt, could only take the benefit of the creditor's proof, and must discharge the bankrupt: *Ex parte Lobbon* (2). If the surety cannot have a double proof, it seems necessarily to follow that, if his right of proof is exhausted by the creditor's act, he cannot bring an action afterwards. This is distinctly the opinion of Pollock, C.B., in *Adkins* v. *Farrington* (3): "Certainly, the old doctrine, more than once enunciated by Lord Eldon, was this—that the payment of a dividend and the obtaining of a certificate, so far as the bankrupt is concerned, is to be considered as a full satisfaction of the debt. According to that doctrine, if the holder of a security proves the debt under the bankruptcy of one of two sureties, the receipt of a dividend would prevent the other from making any claim upon his co-surety."

This doctrine as to double proof applies to the liquidation of companies. I am not aware that there is any decision as to the application of the principle to arrangement. I do not see why it should not apply. The surety is identified with the creditor who proves, and can only claim to stand in his position as to proof and dividend. If he paid before the arrangement, he could only get one dividend; if he paid after the arrangement, and before the second meeting, he would be in the same position. Can he, by deferring payment till after the arrangement is closed, be allowed to sue the debtor, and at the same time capture the dividend taken by the creditor, which clearly belongs to the surety the moment the creditor is paid off?

(1) 3 Ch. D. 450. (2) 17 Ves. 334. (3) 5 H. & N. 586, at p. 598.

4. If the plaintiff is to be deemed a creditor before payment, and is *prima facie* therefore entitled to notice, is the certificate, while it stands, conclusive as to such notice having been duly given? The authorities in insolvency, under 1 & 2 Vict. c. 114, and composition, under sect. 126 of the Act of 1869, are distinct that the omission of a creditor from the schedule or list deprives the debtor of protection as against that creditor. On the other hand, under the liquidation section (sect. 125) of the Act of 1869, such omission, even though fraudulent, does not vitiate the debtor's discharge.

The authorities, however, on the Bankruptcy Act of 1849, which is practically the same as our statute, place the matter beyond doubt. The first of these is *Wesson* v. *Allcard* (1), a decision of the Exchequer Chamber in 1852, to the effect that notice is essential, and that the two things are correlative—the extent to which the resolution is to bind, and the extent to which the certificate of conformity is to bar. A second decision of the Exchequer Chamber, in *Jeffries* v. *Onions* (2), in 1865, settled, in accordance with the opinion of the Exchequer (3), that the certificate would be invalidated if it was shown that the resolution was not carried into effect and that the creditors had not been satisfied. It is possible that the presumption *omnia rite esse acta* might shift the *onus* of proof, and that, as to some matters, the certificate, while undischarged, may bind: see the judgment of Williams, J., in *Naylor* v. *Mortimore* (4). In the present case, from the course of the trial, we must take it that there was no notice. The statement of affairs was not proved, and it did not appear that the plaintiff was returned as a creditor, or got notice.

If the plaintiff was a creditor and had no notice, the arrangement as such is not binding as against him. What is the exact effect of this? It is settled that it does not vitiate or subvert the arrangement as a whole. There is no evidence to show that the arrangement would or could have been affected by the omission of the plaintiff's debt, if it can be called a debt. The bill-holder is concluded by his proof and receipt of dividend: *Lewis* v.

(1) 8 Exch. 260.
(2) 13 L. T. (N. S.) 606.
(3) 7 Exch. 753.
(4) 17 C. B. (N. S.) 207.

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Leonard (1); and this, entirely irrespective of any certificate having been given. If the surety had received notice, he could not have proved without paying the bill, and if he paid after the bank had proved he must have adopted that proof. When he paid he became equitably entitled to the dividend received by the bank: *Thornton* v. *M'Kewan* (2). So long as the bank were holders of the bill they were masters of the situation, and could exercise their discretion in proving and voting without prejudicing their rights against the surety. The surety could have substituted himself as creditor by paying the bill at maturity. Is not the position of the surety determined by the action of the bill-holder? or, though the bank is bound by its proof, is the surety free from the arrangement, and, at the same time, entitled to payment of the dividend received by the bank in that arrangement?

It may be said that though in bankruptcy the plaintiff might be bound by the bank's proof, different considerations apply to an arrangement. If the plaintiff had received notice, he might have paid off the bank, proved the debt, resisted the debtor's proposal, and secured better terms. He is therefore, it is suggested, at liberty to treat the arrangement as non-existent, and, if so, the proof and payment of dividend in the arrangement disappear. Still, it is certain that the bill-holder was bound, and that the plaintiff was entitled, on payment, to get credit for the dividend, as he has done. The acceptance of this benefit makes it hard for the plaintiff to treat the arrangement as a nullity; and it may be that, according to the principle of *Ahearne* v. *M'Swiney* (3), the creditor might be deemed to have adopted the arrangement and the bank's proof, in which case the plaintiff would unquestionably be bound just as much as the bank.

I need not, however, consider this point, which is not free from difficulty, further, as I am disposed to think that, the case coming within sect. 253 of the Act of 1857, the plaintiff was not at the time of the arrangement a creditor, and was not therefore a person to whom notice ought to have been given. *Prima facie*, he would not be bound by the arrangement, as the right of proof and the privilege of discharge are, usually at least, co-extensive. When,

(1) 5 Ex. D. 165. (2) 1 H. & M. 525. (3) Ir. R. 8 C. L. 568.

however, the holders of the bill proved, they did so on behalf of all parties. The plaintiff, who was entitled to and has got the benefit of that proof, is identified with them and his rights against the bankrupt are exhausted. The cases as to double proof, the opinions of Lord Eldon in *Ex parte Lobbon* (1), and of Pollock, C.B., in *Adkin's Case* (2), and the reasoning of Wood, V.-C., in *Thornton's Case* (3), all support this conclusion.

I conclude with a passage from a judgment of Sir N. Tindal: —"The Legislature has provided that the surety, if he pays the debt, may stand in the place of the creditor, where the creditor has proved, or may prove himself, where the creditor shall not have proved. It is the duty of the surety to pay the debt, and if he declines so doing, and thereby permits the creditor to prove, the signing of the certificate of conformity, which is a power given by the statute to the proving creditor, cannot be considered as an act done by the creditor which altered the surety's right without his control, and scarcely, indeed, without his consent. It is not an act beyond his control, for he might have paid the money in due time, and prevented the creditor from proving, and if he voluntarily lies by, and omits the only means of preventing it, he may not unreasonably be assumed to have assented to the act": *Browne* v. *Carr* (4). The plaintiff here would have certainly been barred if the defendant was a bankrupt. After considerable oscillation of opinion, I think that the defendant is entitled to succeed. It would be unfortunate if an arranging debtor, where the bill-holder was bound, was not able to protect himself against the drawer and indorsers, on the ground that they were not creditors at the date of the arrangement.

HOLMES, J.:—

I am at a loss to understand how any question could have arisen at the trial concerning the nature of the contract relied upon by the plaintiff. The facts are undisputed, and the position of the parties seems to me to be clear. Both were liable upon the bill to its holder, but they had agreed that, as between themselves,

(1) 17 Ves. 355.
(2) 5 H. & N. 586.
(3) 1 H. & M. 625.
(4) 7 Bing. 515.

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the defendant was to be the principal debtor and the plaintiff his surety. From this relationship the law implies a contract of indemnity between the principal and surety; and it is, I think, consistent that there was, or may have been an express contract to the same effect. Counsel for the defendant have based their argument upon the proposition that the plaintiff was entitled to make the defendant's contingent liability under the contract of indemnity the subject of proof in the arrangement matter. In support of this contention they have relied on the 257th section of the Irish Bankrupt and Insolvent Act, 1857, and on the 46th and 47th sections of the amending Act of 1872. There have been many decisions on the corresponding provisions in the English statutes, some of which it is a little difficult to understand, or to reconcile with the evident intention of the Legislature. It is, however, unnecessary to examine these cases in detail, inasmuch as I do not find in them a dictum, or even a hint that any of these sections applies to a surety for a debt due by the bankrupt. This is a branch of the law with which I am not familiar, and I feel great diffidence in expressing an opinion upon any matter connected with the Bankruptcy Code. Still I must confess that it would surprise me greatly to find that the right of a surety to prove before he has paid the debt for which he and the bankrupt are liable, has not yet passed beyond the region of discussion. More than forty years ago Lord Campbell pointed out in *Warburg* v. *Tucker* (1), that the object of successive Bankrupt Acts seemed to be that the certificate should enable the bankrupt to start a new man, without the risk of any claim rising up against him in respect of any contract, obligation, or engagement, he had ever entered into before the bankruptcy, however great the difficulty might be in enabling those who had, or might have, future, or contingent, or unliquidated claims upon him, to come in, and, proving the probable value of their claims at the time of the bankruptcy, to receive, along with other creditors, a proportional dividend. Now, the majority of bankrupts owe one or more debts the payment of which is guaranteed by a surety, and an easy mode exists of ascertaining the value of such surety's claim.

(1) 5 E. & B. 393.

No doubt the contract, by which the principal debtor is liable to the creditor, is a different contract from that which gives the surety a right of action against the former when he has paid the latter, but the principal debtor is not liable to both at the same time, and he can never be obliged to pay both. If he pays the creditor, his contract with the surety is not broken, and his liability to the surety arises only when he is relieved by the latter's act from a liability of the same amount. In a state of things so usual and so simple, it would be extraordinary if the wit of legislators and Judges had not long since devised some method which would enable the bankrupt to start a new man, freed by his certificate from liability to either party. If a person, having such an imperfect knowledge of the subject as my own, is at liberty to speculate, I should think that the difficulty might be met by allowing a single proof for the common benefit of both creditor and surety. The dividends thereon would go to satisfy an amount which one or other was entitled to claim from the bankrupt, and his estate would not be subject to a double demand for what is in reality the same debt.

Turning to bankruptcy legislation, I find a provision, not unlike what I have sketched, repeated, with little variation, in successive statutes during the last hundred years. The 253rd section of the Act of 1857 is that now in force. It enables a surety, who has paid or satisfied the debt, even after the bankruptcy, to prove, if the creditor has not already done so, and to stand in the place of the creditor, if the latter has proved. Two propositions are deducible from this provision—first, that the surety cannot prove at all until he has paid the debt, and, secondly, that there can only be a single proof. In the present case the plaintiff did not pay the debt in full until after the certificate, and therefore it seems clear that he could not have proved in the arrangement. But, even if he had paid, he would not have been entitled to do more than take the place of the creditor, who had included the amount of the bill in his proof, and subsequently received the composition in respect thereof. Therefore counsel for the defendant have, I think, failed to show that the plaintiff was entitled to prove. But does it follow from this, as was asserted by Mr. Gordon, and hardly disputed by the opposing counsel, that the plaintiff could bring this

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action after the certificate? If a surety can create a right of action against a bankrupt by paying, after certificate, the debt on which the creditor has already received a dividend, I should think that two or three such actions would be the sequel to almost every bankruptcy. Yet I doubt if any member of the bar now practising has ever met with such a case in his own experience. Mr. Hume challenged his opponents to produce such a case from the reports, and the challenge was not answered. Well, there are a good many to be found from the days of Vesey, junior, onwards, but I think they ceased about fifty years ago. At least, I have not found any later. Those that are reported are not all consistent with each other, but there is no doubt of the direction in which the current runs. I content myself in taking one which may be regarded as conclusive: *Jackson* v. *Magee* (1). In it a surety, having paid the debt after the principal debtor had obtained his certificate, sued him on the implied contract of indemnity. It was held the action would not lie, Lord Denman referring to the section which then in the English code corresponded with our 253rd, and saying that the plaintiff cannot be allowed, by voluntarily delaying the payment of the debt till after a final dividend has been made, to deprive the defendant of the benefit of his certificate. In that case, no doubt, the debt was due before the bankruptcy, but I do not think that this circumstance makes any difference, for the 253rd section contemplates, by its express language, a payment after the filing of the petition.

For these reasons I am of opinion that the action would not have lain if the defendant had been adjudicated a bankrupt. Is it otherwise in the case of an arranging debtor? The 64th section of the Act of 1872 seems to give the certificate of conformity the same effect whether it be in an arrangement matter or under a bankruptcy. But whatever was the intention of the Legislature, legal decision binding on this Court has laid down a distinction. In *Wesson* v. *Allcard* (2) the Exchequer Chamber in England, construing corresponding provisions to those now in force in Ireland, held that, notwithstanding the certificate, the arrangement "is binding against all persons who

(1) 3 Q. B. 48. (2) 8 Exch. 260.

were creditors at the date of the petition, and who had notice of the several sittings of the Court, and it is binding against those persons only." These words are taken from the judgment of Mr. Justice Coleridge, who spoke for all the members of the Court. I own that this case, the report of which, in the Exchequer Chamber, was not referred to during the argument, has surprised me; but there it is. The 347th section of the Act of 1857 enacts that the resolution there referred to shall henceforth be binding and of full force, as well against such petitioning trader as against all persons who were creditors at the date of his petition, and who had notice of the several sittings. The Exchequer Chamber has declared that, even after certificate, the arrangement binds no other persons than those coming within this description. In this case the plaintiff was not a creditor at the date of the petition, and he received no notice. It is true that the bill-holder proved, received a composition, and the plaintiff has been benefited thereby. It is also true that the provisions of the 253rd section apply to an arrangement matter as well as to a bankruptcy. But still I am bound by the language of the statute as interpreted by judicial decision. This conclusion may be lame and impotent, but, if so, it is not, I think, in the power of this Court to come to any other.

JOHNSON, J.:—

The transactions out of which the present action arose were carried on between the defendants and the plaintiff's wife, who, as his agent, managed his business; but nothing turns on this circumstance, and therefore I treat the case, as in law it is, between plaintiff and defendants. The plaintiff was a customer of the defendants; for some years no accounts had been settled; and, in January, 1889, the amount of the plaintiff's indebtedness to the defendants being in dispute between them, the plaintiff, at the defendants' request, gave them his acceptance on a blank bill-stamp, which the defendants filled up as drawers (dated 5th January, 1889) and negotiated for their own use with the Northern Banking Company. Subsequently, in the same month, the defendants and the plaintiff settled the account between them, and ascertained the balance, which the plaintiff then discharged,

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in part by cash payment, and as to the residue, by a bill which the plaintiff paid at maturity, and the defendants undertook and agreed to indemnify the plaintiff against all liability in respect of the bill of the 5th January, 1889. The defendants afterwards carried an arrangement with their creditors under the Bankrupt Acts, 1857 and 1872 (20 & 21 Vict. c. 60, and 35 & 36 Vict. c. 58), in the Belfast Local Bankruptcy Court. The Bank proved in the defendants' arrangement for the bill of the 5th January, 1889, and received the dividend, and then instituted an action, and recovered judgment against the now plaintiff, for the difference between the amount of the dividend which they had received, and the amount of the bill. The plaintiff paid to the Bank the amount of the judgment, and sued the defendants in the present action on their contract of indemnity. The defendants rely for their defence on the arrangement, the proof by the Bank on the bill in the arrangement matter, and the defendants' certificate of conformity, dated the 11th May, 1891; and, in their defence, they averred due notice to the plaintiff of all the proceedings in the arrangement. At the bar, however, it is stated, and admitted by both sides, that it was proved at the trial that the plaintiff had no notice of the arrangement proceedings, and the question is thus reduced to a narrow issue. As between the plaintiff and the Bank, the plaintiff was a principal debtor to the Bank; but, as between the plaintiff and the defendants, the plaintiff was in the position of a surety whose indemnity against liability in respect of the bill was expressly guaranteed by the defendants.

Proceedings in an arrangement matter are, like creditors' compositions, more in the control of the arranging trader than proceedings in bankruptcy are in the bankrupt's control: see *Breslauer* v. *Brown* (1). The defendants' certificate of conformity, which is their defence, released them from all debts proveable in the arrangement; and, if this liability was not proveable in the arrangement, then it is not released or affected by the certificate of conformity. On the other hand, if it was proveable in the arrangement, then the plaintiff, not having notice of the proceedings in the arrangement, is not bound by the certificate: *Wesson* v. *Allcard* (2), in the Exchequer Chamber, which my brethren have

(1) 3 App. Cas. 672. (2) 8 Exch. 260.

mentioned. In either view, therefore, the verdict and judgment for the plaintiff must stand. This being so, it is not, in my opinion, necessary to review or discuss the numerous authorities which have been referred to.

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A. E. R. J.

The defendant appealed to the Court of Appeal (Lord Ashbourne, C., Fitz Gibbon, Barry, and Walker, L.JJ.).

Appeal. 1896. Jan. 15, 16. Feb. 24.

O'Shaughnessy, *Q.C.* and *Hume*, for the appellant:—

In an arrangement matter, when the debtor sets out his debts, pays his composition, and obtains his certificate, he is free from all his old liabilities, and starts a new man. The debt sued for by Carey is not a new debt: there never was any but one debt—the debt on the bill. No doubt, different parties have been entitled thereto at different times, but it is the same debt all through, and the certificate is a bar to anything being recovered thereon.

[They referred to *In re Oriental Commercial Bank*, *Ex parte European Bank* (1); *Ex parte Petrie* (2); *Hooper* v. *Marshall* (3).]

Gordon, *Q.C.*, and *Bartley*, for the respondent:—

The amount sued for by Carey either was a debt or liability existing at the time of Harper's arrangement, or it was not. If it is a new debt it is not affected by the arrangement. If it is an old debt the plaintiff got no notice of the arrangement, and is not bound thereby. Without notice of the proceedings he could not, by paying off the bank, put himself in a position to object to the debtor's proposal.

[They referred to *Ex parte Wiseman* (4); *Wesson* v. *Allcard* (5), and *In re Rooney* (6).]

Cur. adv. vult.

(1) L. R. 7 Ch. App. 99.
(2) L. R. 3 Ch. App. 232, 610.
(3) L. R. 5 C. P. 4.
(4) L. R. 7 Ch. App. 35.
(5) 8 Exch. 260.
(6) 8 Ir. L. T. R. 125.

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Feb. 24.

LORD ASHBOURNE, C.:—

This is an appeal from the Queen's Bench Division, and involves the consideration of some matters of importance to the commercial world. After careful consideration we are all of opinion that the judgment appealed from cannot be maintained. Our reasons all substantially coincide, and the judgment I am about to deliver has been prepared by Lord Justice Walker after conference with us.

In this case, Carey, on January 5, 1889, accepted a bill drawn on him by the defendant for £64 14*s.* 10*d.*, the consideration for which was goods sold. The bill was a four months' bill, and would become due on May 8. It was negotiated by Harper with the Northern Banking Company on January 7. On January 25 a transaction occurred between Carey and Harper, which had the effect of making Harper, as between them, primarily liable on the bill, and bound to indemnify Carey.

On March 3, 1889, Harper presented a petition to the Local Bankruptcy Court for arrangement with his creditors. The Northern Banking Company, the holders of the bill, proved, in the arrangement proceedings, and received a dividend of four shillings in the pound; and on May 11, 1891, Harper obtained a certificate under section 64 of the Act of 1872. Carey had no notice of the arrangement proceedings.

The bank, after the bill matured, sued Carey on his acceptance, giving him credit for the dividend received, and Carey paid, for debt and costs of litigation, £85. For this amount he has sued Harper, who has pleaded, as a defence, the certificate obtained in the arrangement. The short question is, Whether Carey, who must be taken to have had no notice of the arrangement proceedings, is barred by the certificate.

Under section 64 of the Act of 1872, the certificate operates, "to all intents and purposes as if the same were a certificate of conformity under a bankruptcy," and such certificate discharges the bankrupt from all debts provable under the bankruptcy, with certain exceptions not material. But this, by no means, disposes of the case, because it is settled by authority binding upon us, that if a creditor, holder of a bill, has no notice of the arrangement proceedings, he is not bound by the certificate, and can sue the

arranging trader on it notwithstanding the certificate obtained. In this case all through the arrangement proceedings, Harper was the principal debtor, Carey was surety, or liable for his debt, and the bank were holders, and the bank proved and received the dividend payable by the estate in respect of the debt, and the question arises, whether the surety is bound though he had no notice.

Let us first take the case, as it would stand in bankruptcy—1. It is settled that it makes no difference as regards the creation of the relation of principal and surety, that such relation between the parties is created by agreement, or matter subsequent to the making of the bill: *Filbey* v. *Lawford* (1). 2. The only person who can prove on a bill is the holder: *Ex parte Read* (2). The surety has the special rights, that, if he pays the debt, he may come in on the holder's proof, and stand in his place for the dividends, or in such case, if he pays the debt, and no proof has been made by the holder, the surety may prove the demand in respect of such payment as a debt, and receive dividends, not disturbing former ones. 3. If the bankrupt has obtained his certificate, and the surety, afterwards, pays the debt, he cannot successfully sue the bankrupt: *Jackson* v. *Magee* (3); *Ex parte Lobbon* (4); *Adkins* v. *Farrington* (5). 4. There can be but one proof on the bankrupt's estate in respect of the bill. There can be no double proof against the bankrupt as such, and his estate, as such, pays only one dividend: *In re Oriental Commercial Bank, Ex parte European Bank* (6). In that case, Mellish, L. J., says:—"It has been the law, for a great number of years, with reference to proofs in bankruptcy, that if an acceptor accepts bills for the accommodation of the drawer, and the drawer enters into a contract either express or implied (and I do not think there is any difference between the two), that he will provide for the bills when they become due, and then the drawer becomes bankrupt, there cannot be a double proof against his estate—namely, one proof by the holder of the bill, and the other proof by the acceptor of the bill on the contract of indemnity."

(1) 3 M. & G. 468, affirmed in Ex. [Ch.
(2) 1 Glyn & J. 224.
(3) 3 Q. B. 48.
(4) 17 Ves. 334.
(5) 5 H. & N. 586.
(6) L. R. 7 Ch. App. 99.

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Let us now pass to the position of Carey, the surety, in the arrangement proceedings, and consider whether he was a "creditor" within the arrangement sections. The sections of the Bankrupt Act of 1857, up to section 343, deal with bankrupts and creditors of bankrupts, and contemplate, as the "creditor," the person who can make a man bankrupt, and prove against his estate, and, section 253, when it comes to deal with a "surety," or person liable for the debt, contrasts him with the "creditor," and gives him rights through the "creditor," and after he has, by payment, assumed the "creditor's" position. Section 343 enables the trader, who is unable to pay his creditors, to take this other proceeding of arrangement in order to free himself from his debts. Sections 346 and 347 provide for the proof of debts and the assent of the creditors to the debtor's proposal in the arrangement proceeding. Section 346 enacts that, at the first sitting, "the creditors shall prove their debts, such proofs to be, in all respects, as proofs in bankruptcy," and that, if three-fifths in number and value of the creditors who have proved debts to the value of £10, assent to the petitioner's proposal, a sitting for confirmation of the proposal is to be appointed, and due notice of holding the same given to every creditor who was not present at such first sitting. Section 347 provides for the proceedings at the second sitting, enacting, that "at such second sitting . . . the creditors may also prove their debts, and if three-fifths in number and value of those who have proved debts to the amount of £10, shall agree to accept such proposal as was assented to at the first sitting, the terms thereof shall be reduced into writing, and the creditors shall sign the same; and such resolution or agreement shall . . . thenceforth be binding, and of full force, as well against such petitioning trader as against all persons who were creditors at the date of his petition, and who had notice of the said several sittings."

The *status* of "creditor" in bankruptcy and arrangement seems the same—the person who can prove and vote. Sections 46 and 47 of the Act of 1872, group the bankrupt and the arranging debtor together, and, finally, by sections 58 and 64, he is released from debts provable in the bankruptcy or arrangement.

We are of opinion, with Mr. Justice Gibson, that Carey had

not a claim provable in the arrangement, and was not a creditor within the sections.

So far as consistent with legislation, the policy of the Bankrupt law should be adapted to the arrangement proceedings.

It was contended that here the surety could have proved, because the contract of suretyship arose by matter subsequent. This is answered by *Filbey* v. *Lawford* (1). *Wiseman's Case* (2) was relied on, but there the claim did not arise in respect of a bill on which a principal and surety were liable, but in respect of a contract wholly collateral to the bill, the breach of which did not occur till after the bankruptcy. Then it was strongly argued that *Wesson* v. *Allcard* (3) decides that creditors who had not got notice are not bound by the certificate in an arrangement. That case does decide that the holder who could prove and vote, and represented the debt, was not so bound. We do not think that that decision applies either in form or substance. Here, Carey was not the "creditor," and in all substance the debt was represented by the bank. They alone could prove and receive dividends: Carey's rights were through the bank. He and the bank could not both prove, and he got everything which he could be entitled to if he did prove, and all rights of proof were exhausted. It was said that, if the surety had notice, he might have objected to the proposal, and that, if he did not know of the arrangement, he had not the option of paying and proving in respect of his payment. This latter alleged hardship cannot arise when the holder as here proves; and we think the indorsee and holder—the only creditor who can prove—is made the representative of the debt for all purposes, and it is from debts provable that the certificate discharges. The surety's right of action seems as concluded, as his right of proof. If he paid the debt in full, he was entitled in equity to be paid by the bank the dividends received by it.

In substance, the surety has, in this case, all the rights he could ever assert, and in form we think he was not a creditor within the sections.

The limitation to the effect of the certificate of conformity, established by *Wesson* v. *Allcard* (3), is, in our opinion, only

(1) 3 M. & G. 468. (2) L. R. 7 Ch. App. 35. (3) 8 Exch. 260.

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applicable to the case of the creditor, the holder of a bill—the statutory representative of the debt—who has not received notice of the proceedings.

In the result, we are of opinion, that judgment must be entered for the defendant, and the appeal allowed with costs.

Solicitor for the plaintiff: *James Brown.*
Solicitors for the defendant: *Clarke & M'Cartan.*

G. Y. D.

Ex. Div. 1896. Nov. 2.

Appeal. Nov. 19, 20.

SPAIGHT *v.* BAKER (1).

(1895. No. 5069.)

Landlord and tenant—Eviction for non-payment of rent—Redemption—Restitution to possession—Land Law (Ireland) Act, 1896, *s.* 16—Res Judicata.

On the 25th November, 1895, S., the landlord of an agricultural holding, commenced an action to recover possession for non-payment of rent, there being three and a-half years' rent due at the date of the writ. On the 7th February, 1896, judgment was marked, and on the 19th April, 1896, a caretaker's notice, under sect. 7 of the Land Law (Ireland) Act, 1887, was served by the landlord. The Land Law (Ireland) Act, 1896, came into operation on the 14th August, 1896. H. and his wife, who had become entitled to the tenant's interest, tendered, on the 18th August, 1896, and afterwards, to S. two years' rent, which, being refused, they lodged two years' rent in Court on the 9th October, 1896, and moved for a writ of restitution:—

Held, by the Court of Appeal (reversing the decision of the Exchequer Division (Andrews and Murphy, JJ.)), that the applicants were entitled to an order for restitution, they undertaking to pay the rent accrued since the commencement of the action.

MOTION on behalf of Daniel Herlihy and his wife for a writ of restitution.

The farm of Milleenawillan, in the county of Cork, the subject-matter of this action, was formerly in the occupation of Timothy Donohue, who held it from the plaintiff at the rent of £13 15*s.*

(1) In the Exchequer Division before ANDREWS and MURPHY, JJ.

In 1870, Daniel Herlihy married a daughter of Donohue, and by marriage articles dated the 7th February, 1870, Donohue assigned the farm to Daniel Herlihy subject to his own life use of it. Donohue died in April, 1887, and after his death one William Baker obtained possession. At the end of 1895, Herlihy and Mrs. Herlihy brought an ejectment on the title against Baker; and on the 27th January, 1896, obtained a decree from the County Court Judge of Cork. On appeal this decree was affirmed by the Lord Chief Baron at the Cork Spring Assizes in 1896; and on the 31st March, 1896, Herlihy was put in possession by the sheriff.

Baker had not paid the rent of the farm, and on the 25th November, 1895, the landlord commenced the present action to recover possession for non-payment of rent, there being then due a sum of £52 7*s.* 6*d.* over three years' rent. On the 7th February, 1896, judgment was marked, and on the 19th April, 1896, a notice pursuant to section 7 of the Land Law Act, 1887, was served on Herlihy.

On the 18th August, 1896, the solicitor for Herlihy wrote to the plaintiff offering two years' rent; it was again offered subsequently; but the plaintiff refused to accept it. On the 9th October, 1896, Herlihy lodged the two years' rent in Court, and served notice of this present motion.

J. J. Clancy, for the applicants, referred to section 16 of the Land Law (Ireland) Act, 1896, and sects. 60 to 71 of the Landlord and Tenant Act, 1860, and submitted that the meaning of "ejectment" meant the whole course of proceedings necessary to oust the tenant, and that the ejectment was pending at the time of the passing of the Act.

P. D. Fleming, for the plaintiff submitted that the 16th section of the Act of 1896 was not retrospective, and that the case did not come within the scope of that section.

ANDREWS, J.:—

The question which we have to decide on this motion arises upon the construction of the 16th section of the Land Law (Ireland) Act, 1896, which enacts that in the case of any ejectment

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which shall be or has been brought for the non-payment of the rent of a holding to which the Land Law Acts, as amended by that Act, apply, when the rent in arrear exceeds two years' rent the tenant may pay, tender, deposit, or lodge, under sects. 60 to 71 of the Landlord and Tenant Act of 1860, the sum of two years' rent, and that thereupon he shall be in the same position under those sections as if two years' rent was the sum due for rent up to the commencement of the proceedings in the ejectment.

The Act of 1896 received the Royal assent on the 15th August last. In the present case judgment for possession in ejectment for non-payment of rent was obtained on the 7th February last; and the amount of rent ascertained to be due was £52 7*s.* 6*d.* which exceeded three years' arrears. This judgment was executed by a notice served pursuant to the 7th section of the Land Law (Ireland) Act, 1887, on the 19th April, 1896, and as the law then stood, the tenant was not entitled to redeem unless he paid the full sum of £52 7*s.* 6*d.* within the prescribed time, and the landlord had acquired the right to the possession of the lands discharged from any right of redemption unless that sum was so paid. The Act of 1896 having become law on the 15th August, the tenant afterwards and within the prescribed time tendered two years' rent which was refused, and he has now moved for a writ of restitution. The only question which has been raised on the motion is whether the 16th section of the Act of 1896 applies to this case.

It is a familiar principle, and an obviously reasonable and just one, that where rights have been acquired in a judicial proceeding under existing laws, an Act subsequently passed is not to be construed as prejudicially affecting such rights unless it does so by clear words or necessary implication. I do not find in the 16th section or any other part of the Act of 1896 either clear words or necessary implication to show that the 16th sect. applies to a case in which, before that Act was passed, judgment in ejectment had been both obtained and executed under the then existing law. In my opinion the 16th section and sections 60 to 71 of the Act of 1860 are capable of being legitimately applied after the 15th August, 1896, only to ejectment proceedings which were then pending, or subsequently brought, and not to ejectments which

had been previously judicially determined by the judgment of the tribunal before which they had been brought for determination, and under the determination of which the parties thereto had acquired specific vested rights.

Section 16 is within Part I. of the Act of 1896, and the 50th section provides that Part I. shall, save as by that Act is expressly provided, apply to every proceeding pending at the commencement of the Act. The expression "pending" is sought to be extended in this case to "pending or determined," and I do not think it can be so extended. The ejectment in the present case was not then pending. It had been finally determined. I find nothing in any of the other Land Law (Ireland) Acts which can be used to show that the words "any ejectment which has been or shall be brought" in the 16th section of the Act of 1896, extends to ejectments theretofore finally adjudicated upon and determined, with the result of giving to the parties certain vested rights under the then existing law, and in which the judgment had been executed, and I do not think it is at all necessary to read the reference in the 16th section of the Act of 1896 to the 30th section of the Act of 1887, as obliging the Court to adopt such a construction.

I am therefore of opinion that the tenant in the present case was not entitled to redeem on payment of two years' rent only, and that his motion for a writ of restitution ought to be refused.

MURPHY, J.:—

I concur. Where the landlord by process in ejectment obtained judgment, he re-entered on the lands. On the service of the notice under the 7th section of the Act of 1887, the tenant became and now is merely a caretaker. If then the tenant paid the amount ascertained by the judgment to be due, within six months, he could become tenant again, but at present he has no estate in the lands. If the section referred to had been intended to apply to cases where judgment had been entered and a *habere* executed, the words would have been different.

In my opinion the words, "where a writ has been or shall be issued" are not the words that would have been used to include a

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case where judgment had been obtained and execution issued. The words used point merely to proceedings pending.

J. P. B.

Appeal. Nov. 19, 20.

The Herlihys appealed (1).

Bourke, Q.C., and *Sheehan*, for the appellants:—

The case comes within the express words of section 16 of the Land Law Act of 1896. The fact that judgment was obtained before the passing of the Act does not affect the question, because some of the sections of the Act of 1860, which have been incorporated by the 16th section, deal only with cases where judgment has been recovered. Moreover, sub-sect. 2 of section 16 expressly deals with the case of *res judicata*: *Sutton* v. *Walsh* (2).

Wright, Q.C., and *P. D. Fleming*, for the plaintiff:—

There was no proceeding pending in this action on the 14th August, when the Act of Parliament was passed. "Has been brought" means that an action has been commenced, but is still pending: *Cropper* v. *Smith* (3). Once judgment is obtained, the action ceases to be pending. In any event the person applying for an order for restitution must pay all the arrears of rent accrued after action brought: *M'Dougall* v. *Nolan* (4).

Nov. 20.

LORD ASHBOURNE, C.:—

This case, which has been very fully and very ably argued, raises an interesting point on the construction of section 16 of the Act of 1896. The clients of Mr. Bourke and Mr. Sheehan, Herlihy and Mrs. Herlihy, having lodged a sum of two years' rent in Court, claim the benefit conferred by the section.

There were over three years' rent due to the landlord up to September, 1895, and the landlord issued a writ on the 25th November, 1895, for the amount due, over £52, nearly four years'

(1) In the Court of Appeal, before LORD ASHBOURNE, C., and FITZ GIBBON, BARRY, and WALKER, L. JJ.

(2) 26 L. R. Ir. 629.

(3) 28 Ch. D. 148.

(4) 15 Ir. L. T. R. 48.

rent. On the 7th February, 1896, the landlord obtained judgment, and on the 19th April, 1896, a caretaker's notice under sect. 7 of the Act of 1887 was served by the landlord. The Act of 1896 was passed on the 14th August, 1896, and on the 9th October, within the six months limited for redemption, Mr. and Mrs. Herlihy lodged two years' rent in Court, and claim that having regard to sect. 16 they are entitled now to ask the Court to exercise its jurisdiction for an order for restitution. The landlord challenged that contention, urging that his case was *res judicata*, and therefore the section could not be applied. He brought the case before the Court of Exchequer, and the judges there decided in his favour that the section did not apply, having regard to the fact that the judgment was obtained before the passing of the Act, and holding that the fact that the redemption period was then current, and would not expire till afterwards, was not to be taken into account.

I could understand the relevancy and force of the reasoning as to *res judicata* under other circumstances, and but for the words of sect. 16. I agree with the argument of Mr. Bourke and Mr. Sheehan that in that section the words upon which the decision is to be given must be found, and enough is there found to justify the application of Mr. and Mrs. Herlihy to avail themselves of the right to lodge two years' arrears of rent. The words of the section are—"In the case of any ejectment which shall be or has been brought for the non-payment of the rent of a holding to which the Land Law Acts as amended by this Act apply where the rent in arrear exceeds two years' rent, the tenant may pay, tender, deposit, or lodge, under sections 60 to 71 of the Landlord and Tenant Law Amendment Act (Ireland), 1860, the sum of two years' rent instead of the sums therein respectively required to be paid, tendered, deposited, or lodged in respect of the rent and arrears, exclusive of costs, and upon such tender, payment, deposit, or lodgment, the tenant shall be in the same position under those sections as if two years' rent were the sum due for rent up to the date of the commencement of the proceedings in the ejectment."

It is quite obvious on the face of it, in the words referring to the case of ejectments that have been brought, that it is intended

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Lord Ashbourne, C.

not to be confined to future ejectments, but it is distinctly applicable to ejectments that have been brought, and by its reference to the redemption code in Deasy's Act, the 11 sections, from 60 to 71, it is obvious that it was dealing with the redemption period, and with the modification that was to be attached to the action necessary to get the benefit of the redemption period. Having regard to the construction of this section, and adding the obvious argument of Mr. Bourke and Mr. Sheehan, founded on the reference in sub-sect. 2 to sect. 30 of the Act of 1887, there admittedly dealing with *res judicata*, I have arrived at this conclusion, that the parties are entitled to avail themselves of the right to lodge two years' rent, in substitution for the larger amount mentioned in Deasy's Act. The argument at the outset was confined to the criticism of the words of sect. 16; and the decision of the Exchequer Division having proceeded on a wrong view, I have intimated my opinion, which is in favour of the appellants on the construction of the section. Mr. Wright and Mr. Fleming, however, in addition to discussing the construction of the section, said that even if the Court thought that sect. 16 did apply, it was an application to the equitable jurisdiction of the Court; and, since first the Courts have been exercising this jurisdiction under the Act of 1860, a tenant who came in to get the benefit of redemption was told he must do what was just, by paying any rent which accrued due after the date of the writ. It was said by Mr. Wright and Mr. Fleming that this was the settled practice of all the Courts since 1860, and a case was referred to of *M'Dougall* v. *Nolan* (1), which was heard before Palles, C.B., and Fitz Gerald, B., and the matter appears to have been fully discussed before those learned judges. The marginal note states—"The Court will not make an order for restitution under the Landlord and Tenant (Ireland) Act, 1860, s. 71, unless the tenant pays, or undertakes to pay, any rent which has fallen due before the making of the order, although not till after the service of the notice of motion; but the Court may in its discretion give time for such payment." When the matter was being discussed, Fitz Gerald, B., said—"Another half-year's rent has accrued due since you served notice of motion.

(1) 15 Ir. L. T. R. 48.

Should not all rent due at the date of the order of the Court be discharged?" And later on he said—"We might exercise that discretion by giving you time to pay the rent which fell due the other day." In giving judgment the Chief Baron said—"My opinion is as clear against you as that two and two make four. We follow the practice in equity under the old system. I remember clients of my own being made to pay the whole amount of rent due in redemption suits." But when this case was cited before us, Mr. Bourke intervened, and said he was willing to make payment of, or give security for, the rent which had accrued since the writ was issued, and he subsequently offered to bring it into Court.

Under the circumstances we allow the appeal, on the construction of sect. 16, to which in my judgment I entirely confine myself, the undertaking of Mr. Bourke to be made part of our order.

FITZGIBBON, L.J.:—

My inability to sustain the decision of the Court below does not rest on any question whether there was a "proceeding pending" within the meaning of sect. 50 (1), at the commencement of the Act of 1896, or whether that Act is retrospective in any legal sense. It rests simply upon the construction, subject-matter and effect of sect. 16. That section expressly applies "in the case of any ejectment which shall be or has been brought," and it expressly enables those persons who held a position under sections 60 to 71 of the Act of 1860, to place themselves "in the same position" by complying with less onerous conditions. Sect. 16 clubs together all the people who might "pay, tender, deposit, or lodge," money under any of the sections 60 to 71 of the Act of 1860. My view of the matter is made clear by referring to those sections, and seeing to whom each of them applies. Sect. 60 applies to cases where an ejectment is brought, and provides that the particulars of the rent due up to the bringing of the ejectment shall be endorsed on the writ or process.

Then follow a series of sections in pairs, relating to various stages of the proceedings in the County Court, and in the Superior

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Courts. Sections 61 and 62 provide for lodgment of money before appearance, and before judgment, where the amount is disputed; sections 63 and 64 deal with the period between judgment or decree and execution; section 65 enables the defendant to stay the *habere* by paying the sheriff; finally, sections 70 and 71 deal, and deal *only*, with the period after both judgment and execution.

The whole legislation has, for its subject-matter, certain classes of persons who have reached different stages of legal proceedings taken against them in ejectment for non-payment of rent. When sect. 16 is extended to "any ejectment which has been brought," of course it includes all pending ejectments; but it must equally include all ejectments which have not passed beyond the latest of the several stages at which money can be paid or lodged under sections 70 and 71 of the Act of 1860. That is not retrospective legislation; it simply gives relief to the same people to whom previous legislation would otherwise apply. In its very words, it enables them to attain "the same position" on different conditions. What relief does it give them? It substitutes "two years rent" for the full amount of the rent and arrears up to the time of bringing the ejectment, as the amount to be endorsed under sect. 60, which, in this case, would have been between three and four years' rent, due and ending Sept., 1895.

Under the Act of 1860, the position of Mr. Bourke's clients, was that of persons "having a specific interest in the tenancy," who, though evicted, could get restitution, as of right, upon paying or lodging the whole rent due up to the time of bringing the ejectment, and complying, in addition, with conditions as to subsequent rent imposed under the equitable jurisdiction of the Court. I cannot read section 16 as open to any ambiguity, in enacting that a payment or lodgment of two years' rent shall place these people in the same position, as to restitution, which payment or lodgment of the full amount would have purchased for them under sections 70 and 71. Every argument which imputes a retrospective character to the Act of 1896, would equally apply to the Act of 1860, which enabled tenants to save or recover their holdings by paying the rent due, even after execution, without having recourse to the more costly jurisdiction of a Court of Equity. But in every case—in

Equity—under the Act of 1860—and under the Act of 1896—alike, the landlord must have taken possession before the tenant applied for restitution; in every case alike, the landlord must have got judgment, and there must have been a *res judicata* in his favour. But the judgment was for the possession of the land, the *res judicata* was the landlord's right to the possession, and the procedure for restitution was, in its very nature, an equitable relief against a legal judgment.

The tenant is not relieved from personal liability, but the discharge of more than two years' arrears of rent is no longer a condition precedent to restitution. Mr. Bourke admits that his clients must pay, in addition, the rent accrued since the commencement of the action. We will discharge the order appealed from, and direct the writ of restitution to issue forthwith, but the tenant, by his counsel, undertaking to pay the subsequent rent, £13 15*s.*, within fourteen days, our order will not issue until the amount has been paid. As the *status* of the appellant was contested in the Court below, the plaintiff must pay £4 4*s.* costs there, with the costs of the appeal.

BARRY, L. J.:—

I have nothing to add, because the case has been very fully discussed at the bar, and also very fully by the Lord Chancellor and Fitz Gibbon, L.J. I am unable to concur with the Court of Exchequer in dealing with this case on the doctrine of *res judicata*, because section 16, by its provisions deals with judgment in ejectment, and execution, and *habere* executed. I am therefore of opinion that, confining myself to the construction of section 16 alone, the tenant is entitled to get his writ of restitution on the terms proposed.

WALKER, L. J.:—

I am of the same opinion, and I think all we have to do is to interpret a very plain section. Sections 60-71 of the Act of 1860 conferred certain rights on a tenant upon paying, tendering, lodging, or depositing, his full rent and arrears, no matter how much was owed. Some of those rights relate to a period before judgment, others to a period between judgment and execution, and finally sections 70 and 71 deal with the

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period after execution and before the expiration of six months. The subject-matter in those two last sections is the right of the tenant who lodges or pays all he owes after execution. The 16th section substitutes for full rent and arrears to date of action the amount of two years' rent, though more be due. A *res judicata* is involved in both the original and amending code, and whether it be under the old law or the new, the rent must have been ascertained by a judgment, and two years' rent of the amount ascertained by the judgment are substituted in ease of the tenant for the entire sum ascertained by the judgment. That is made still clearer by reference to section 30 of the Act of 1887, which provides for an order to be made after judgment.

Thus the Act of 1896, by express exception, excludes from its operation one case in which there had been a *res judicata* and an order founded upon it. The words are "an order has been or shall be made," that is, has been made after judgment. I express no opinion upon the effect of section 50 in a case like the present.

Solicitors for the plaintiff: *T. R. Wright & Son.*
Solicitor for the Herlihys: *D. Donovan.*

R. D. M.

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GREGG & CO. *v.* GARDNER (1).

(1895. No. 10,655.)

Practice—Costs (party and party)—Counsel's fees—Expenses of witnesses (unexamined) where verbally directed by counsel subsequent to advice of proofs—Costs of attendance of local solicitor at assizes.

In an action for £54, for goods sold, involving a question of agency, in which the plaintiff's case was abandoned before all the defendant's witnesses were examined, the defendant's solicitor charged in his bill of costs for fees of £10 10*s.*, £10 10*s.*, and £7 7*s.*, paid to counsel at the trial. The Taxing Master moderated these fees to £7 7*s.*, £7 7*s.*, and £5 5*s.*:—

Held, that the fees having been paid in good faith, and being reasonable, should have been allowed.

(1) Before SIR P. O'BRIEN, L.C.J., and O'BRIEN, JOHNSON, and HOLMES, JJ.

The expenses of attendance at the trial of a necessary witness (who, owing to the course of the trial, had not been examined) should be allowed where his attendance has been directed by counsel, verbally or in writing, subsequent to advice of proofs.

MOTION to review taxation of the defendant's costs in the action, which was brought to recover £54 15*s.* 11*d.*, for goods sold, and was tried at the County Antrim Spring Assizes before Mr. Justice Holmes and a special jury, resulting in a verdict for the defendant, the plaintiff's case, which depended on a question of agency, breaking down before all the witnesses for the defendant had been examined.

O'Shaughnessy, *Q.C.*, and *R. F. Harrison*, for the defendant, now moved to review the taxation by Master Davis of certain items in the bill of costs (furnished at £197 9*s.* 3*d.*, and reduced on taxation to £120 15*s.* 8*d.*) including the following :—

(*a*) Disallowance in part of the amounts charged for matter briefed in the case for counsel to advise proofs, for taking evidence of witnesses for instructions for brief, and for draft brief and copies. As to these items the Taxing Master stated :—"The action was brought to recover £54 15*s.* 11*d.*, arising out of a building contract; the costs were furnished at £197 9*s.* 3*d.* I ascertained on careful examination the proper length to allow for copy case for proofs, and measured and allowed for same accordingly. I allowed a fee to the solicitor for taking the evidence of the number of witnesses for whom payment is claimed in costs, and from whom a note of evidence was briefed. The fee I allowed as instructions for brief I allowed in the exercise of my discretion as fair and reasonable. The draft brief (was) charged at £15 10*s.*, I allowed £9 6*s.*, and I did so consequential upon the ascertained length of case for proofs, and the length I allowed for statement of evidence. I measured the copy brief on the same principle as last mentioned, and on ascertainment of the proper length of documents . . . In the taxation of the costs I had regard to all the circumstances of the case."

Counsel urged that this was a test case, as the question involved in the action was whether the defendant was responsible for goods

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obtained by a person whom the plaintiffs alleged was his agent, and that an adverse decision would have involved the defendant in liabilities for considerable amounts to several other persons, and also that all the documents and correspondence briefed were material, as the defendant would be open to cross-examination in regard to the transactions to which they referred. It was the duty of the Taxing Master to have regard to "the interest of the parties" in the case: R. S. C., Order LXV., Rule 6 (38) (1893), and the nature and importance of the cause or matter, as well as the amount involved: R. S. C., Order LXV., Rule 64 (37); *M'Bride* v. *M'Bride* (1). The principle upon which the Master acted, as set out in his reasons, was wrong. [THE COURT intimated that the position of the plaintiffs could not be affected by the consideration that on the result of their action depended the liability or non-liability of the defendant to other persons; that they concurred in what the Master had done, and that it would be useless, assuming the reasons for the disallowance to have been incorrectly or insufficiently given, to send the matter back for a formal amendment.]

(*b*) Disallowances in part of counsels' fees on the trial. £3 3*s*. being struck off the fees (£10 10*s*.) charged for the briefs to each of two senior counsel, and £2 2*s*. off the fee (£7 7*s*.) charged for brief to junior counsel. The Master stated, as his reasons for the disallowance—"Having regard to the reduction in length of briefs, and the amount claimed in the action, I considered the fees to counsel were too high, and, in the exercise of my discretion, I moderated same to what I conceived to be fair and reasonable fees."

Counsel referred to and relied on the Rule above cited, and submitted that on this point the true principle was, as laid down in *Robb* v. *Connor* (2), that where a solicitor, acting *bona fide*, and without extravagance, pays a fee to counsel, that fee should be allowed as well in party and party costs as between solicitor and client. In that case the Master of the Rolls (Sir E. Sullivan) said that there seemed to him to be no principle in this mode of "clipping fees." There £2 2*s*. had been struck off a fee of

(1) [1894] 2 Ir. R. 76. (2) Ir. R. 9 Eq. 380.

£14 14*s.*, and a like amount off fees of £10 10*s.* and £9 9*s.* to second and junior counsel. Similarly, in *M'Bride* v. *M'Bride* (1), this Court held that the amount recovered in an action was not the sole test of its importance, and where the Master had struck £1 1*s.* off a fee to counsel to advise proofs (£3 3*s.*), overruled the disallowance. Again, in *Mahalm* v. *M'Cullagh* (2), where counsel's fees had been similarly treated, the Vice-Chancellor held that those fees, not being excessive, should have been allowed. In *The City of Lucknow* (3), in an admiralty action, the Taxing Master having struck 25, 10, and 3 guineas off the fees (75, 60, and 30 guineas) paid to counsel, Butt, J., directed the full amounts to be allowed, as he thought the fees were reasonable. The fees in the present case were paid in good faith, and the amount was reasonable. [HOLMES, J.: The order of the Court in these cases must always take this form, that the amount of the fee was reasonable; and the only general principle that can be suggested is this, that the amount must be at once reasonable and be paid in good faith, and that where the disallowance is not considerable, it is not to be made at all.]

(*c*) The disallowance of the expenses of a witness named Frizelle, sanitary engineer and lead merchant, for two days, at £1 1*s.* per day. The Taxing Master gave as his reason for the disallowance that there was no evidence before him to support this charge for a witness who was not examined.

Counsel stated that the attendance of this witness had not been directed on the advice of proofs, as it was not then known that he could give evidence material to the defendant's case, but that subsequently, on learning this, the defendant's solicitor had communicated with counsel, and had received verbal directions that he should be summoned to attend. Counsel now urged that it must often happen that at the time that the case for proofs was given out, a litigant and his solicitor would be unaware that some other persons could give material evidence. If the Taxing Master was right in principle, then, where, owing to the break down of the plaintiff's case, such persons were not, in fact, examined, a defen-

(1) [1894] 2 Ir. R. 76. (2) 31 L. R. Ir. 147. (3) 51 L. T. (N. S.) 907.

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dant could never recover the costs of their attendance. [JOHNSON, J.: The Master must have been under some misapprehension. A solicitor would be responsible for negligence if he did not procure the attendance of a witness who had been directed by counsel, whether verbally or otherwise.]

(*d*) Disallowance in part of a sum of £3 3*s*., at £1 1*s*. a-day, paid to Mr. M'Ildowie, solicitor, as a witness. The Master stated: —"This fee to a solicitor witness, who is a local resident, I considered too much. I allowed £1 1*s*. for his attendance, which I considered reasonable." [In view of the circumstances mentioned by the Court, that this witness must, in the ordinary course of his own business at the Assizes, have been present during the progress of the case, counsel did not press this objection.]

Gordon, *Q.C.*, and *Hume*, for the plaintiffs, resisted the application.

THE COURT held that, as regarded the fees to counsel and the expenses of the witness Frizelle, the Master had proceeded on a wrong basis, and remitted the matter to him, with a direction that these items should be allowed.

Solicitors for the plaintiffs: *J. A. Love & Co.*
Solicitor for the defendant: *R. H. Orr.*

A. E. R. J.

HEHIR *v.* DUBLIN UNITED TRAMWAYS CO. (1).

(1896. No. 905.)

Q. B. Div. 1896. Dec. 1.

Costs (party and party)—Plaintiff in action of assault accepting less than £5 lodged in Court in satisfaction of his claim—Motion to the Court for an order in lieu of a certificate—"Trial"—R. S. C., Order LXV., Rule 4 (1893).

In any action for a wrong or injury disconnected with contract (except for replevin, slander, libel, malicious prosecution, seduction, or criminal conversation), where the plaintiff accepts a sum not exceeding £5 lodged in Court in satisfaction of his claim—if the parties reside within the same civil bill jurisdiction—he is, under Order LXV., Rule 4, not entitled to any costs; and the provision in that rule, that, "in case there has been no trial," the Court, on motion, may make an order that the case was a fit one to be tried in the High Court, thus entitling the plaintiff to costs, does not apply to the case of a plaintiff accepting money lodged in Court in satisfaction of his claim by the defendant.

MOTION to review taxation, and for an order "that the plaintiff be declared entitled to his costs of this action, and for the costs of this application, or for such other order, etc." The action was brought against the defendant Company to recover £500 damages for assault and battery, and false imprisonment. The facts had reference to the alleged misconduct of a servant of the defendants in demanding from the plaintiff, and obstructing his exit until he had paid, in addition to his own fare, the fare of another passenger who had left the car stating that a friend on the outside would pay for him. The Company lodged £1 in Court with their defence. This sum the plaintiff accepted in satisfaction of his claim. As both parties resided within the same civil bill jurisdiction in which the cause of action had arisen, the Taxing Master refused to certify for any costs.

Philip White, for the plaintiff, now moved the Court for an order, as above.

(1) Before O'BRIEN and JOHNSON, JJ.

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C. Mac Dermot, for the defendant Company, submitted that the second part of the application was, in any event, untenable, as the notice did not in terms ask for the certificate mentioned in R.S.C., Order LXV., Rule 4.

Philip White, in reply :—

The application, in the first instance, is for a direction to the Taxing Master. The plaintiff has succeeded, and costs follow the event, for the Rule (Order LXV., Rule 4) does not apply here. The money lodged in Court does not represent the sum recoverable or recovered in the action. In the alternative the plaintiff applies, not for a certificate, but an order of the Court "to the like effect," there having been no trial. The case was a "fit" one to be tried in the High Court, and substantial damages would be given by a jury. The reason why the plaintiff accepted the money so lodged was that he might have been forced to go to the House of Lords on the question of the scope of the defendants' servant's authority. A similar question was involved in the recent case of *Delany* v. *The Dublin United Tramways Company* (1), where the appeal taken from the decision of the Court of Appeal to the House of Lords was compromised. [O'BRIEN, J. : But here the plaintiff has tried the case himself, and accepted £1 as the measure of his injuries.] In *M'Sheffrey* v. *Lanigan* (2) the plaintiff accepted 6*d.* lodged in Court in an action for £500 for slander, and the Court of Appeal held that, under sect. 126 of the Common Law Procedure Act, 1853, he was entitled to his costs. [JOHNSON, J. : Mr. Wylie's book on the Judicature Acts, at page 842, contains a reference to an unreported case in this Court of *Doherty* v. *Gamble* (3), where, under sect. 97 of the Common Law Procedure Act, 1856, which corresponds to Rule 4 of Order LXV. (1893), a plaintiff in an action for assault and battery, who had accepted £1 lodged in Court by the defendant, was deprived of

(1) 30 L. R. Ir. 720, 740. (2) 20 L. R. Ir. 528.

(3) Unreported. *Wylie, Q.C.*, stated to the Court that he was counsel in *Doherty* v. *Gamble*, which was so decided, on the ground that cases of slander, such as *M'Sheffrey* v. *Lanigan*, were excepted from sect. 97, and were governed by a distinct rule, under which, to deprive the plaintiff of costs, *the jury* must have given damages under 40*s*.

all costs.] Still, even in accordance with that decision, the Court has power, under the last clause of Rule 4, to make an order, giving costs in a fit case.

O'BRIEN, J.:—

The motion, apparently, is one of an unimportant character, but to accede to it would involve a serious revolution in the law of the Courts as to costs. From the time of the Common Law Procedure Acts till now it has never been dreamed that a plaintiff who draws out money lodged in Court in satisfaction of his claim, in such an action as the present, could tax his costs on any other than the ordinary basis, or could get from the Court any certificate such as Mr. White applies for here. The concluding clause of the Rule, on which he relies, does not, in my view, apply to cases like the present, but to those where there has been judgment by default, or proceedings in the nature of demurrer by which the action has been terminated. Where a plaintiff accepts money lodged in Court, there is, I think, a trial; he takes the amount as representing all to which he considers himself entitled, and cannot afterwards apply for what is really a certificate under the Rule. The motion must be refused with costs.

JOHNSON, J., concurred.

Solicitor for the plaintiff: *J. C. Sullivan.*
Solicitors for the defendants: *Casey & Clay.*

A. E. R. J.

Appeal. 1896.

ROBINSON, Tenant; WAKEFIELD, Landlord (1).

April 24, 27. *Lease for lives and years granted in* 1828—*Subletting Act* (7 *Geo.* 4, *c.* 29)—*Covenant against subletting—Landlord and Tenant Act*, 1860, *ss.* 9, 18—*Land Law* (*Ireland*) *Act*, 1881, *s.* 57—*Consent by agent of landlord—Tenant for life and remainderman.*

The lease of a holding comprising 54 acres, made in 1828, was assigned in the year 1878 by a deed, describing the holding as "now in the possession of W." (the assignor) "and his under tenants." At that date portions of the holding were sublet to six cottier tenants. The agent of the landlord indorsed on the deed his assent to this assignment. The landlord at that time was tenant for life of the lands. The portion of land held by three of the subtenants subsequently came into the possession of the immediate tenant:—

Held (1), that the consent of the agent was a sufficient consent by the landlord, within the meaning of the Subletting Act, to the sublettings in existence at the date of the assignment.

Held (2), that the consent given by the tenant for life was sufficient to bind the remainderman.

Appeal by the landlord from an order of the Land Commission dated the 20th January, 1896, fixing a fair rent for the holding (2). The holding consisted of part of the lands of Derryean, and comprised 54a. 3r. 22p., held under lease dated the 29th February, 1828, from Thomas C. Wakefield (the grandfather and predecessor in title of the present landlord) to James Woodhouse for two lives (one of which was still in being) or 31 years, at the rent of £60. The lease contained a covenant by the lessee for himself, his heirs, executors, administrators and assigns, "that he or they shall pay unto the said Thomas Christy Wakefield, his heirs or assigns, the sum of £60 sterling as a penalty in case he or they shall alien, sell, or sublet the said hereby demised premises, or any part thereof, without the consent of the said Thomas Christy Wakefield, his heirs or assigns, first obtained in writing."

(1) Before FitzGibbon, Barry, and Walker, L.JJ.

(2) See the case reported—[1896] 2 I. R. 194.

By assignment, dated the 24th April, 1878, the lessee's interest in the lease was assigned to John Robinson (the respondent), and in the assignment the parcels were described as:— "All that and those that farm, tenement, and parcel of land in Derryean, together with all houses and buildings thereon, as the same was formerly in the possession of James Woodhouse, deceased, and now in the actual possession of Thomas Atkinson Woodhouse, and his undertenants, containing 54A. 3R. 22P."

The consent of the landlord's agent to this assignment was endorsed thereon. (See [1896] 2 I. R. 196.)

Prior to the assignment of 1878, the holding had six or seven cottiers on it; three of whom were still there. The portions held by the other three subsequently came into the hands of the tenant, who re-let them to three other sub-tenants without any fresh consent from the landlord. He also made a fresh subletting of two acres to another cottier tenant. On the 29th October, 1887, John Robinson served a notice to fix a fair rent, but it was held that he was not *bona fide* in occupation, on account of these latter sub-tenancies. (See the case reported 30 L. R. I., 547.) Robinson subsequently got up possession of the four small holdings created since 1878, and served a fresh notice to fix a fair rent.

At the date of the assignment of 1878 Thomas Christy Wakefield was tenant for life of the lands under a deed of settlement dated the 13th February, 1862.

Campbell, Q.C., *Meredith, Q.C.*, and *Hume*, for the landlord:—

The Act 7 Geo. 4, c. 29, does not validate a consent given by an agent, and there is no power under the Act for an agent to take the landlord's place. Deasy's Act was the first to recognize an agent as a substitute for his landlord. The Subletting Act requires an express consent in writing by the landlord. The most that can be inferred is that the landlord had notice of the sub-tenancies, but there is no express consent in writing. Had the agent authority to consent on behalf of the landlord? The *onus* is on the tenant to prove this: *M'Grath* v. *Ahern* (1), referred to in *Smyth and Donaghey* v. *Edie* (2). Where the statute is

(1) 20 L. R. Ir. 341. (2) 27 Ir. L. T. R. 86.

Appeal. 1896. ROBINSON, *Tenant;* WAKEFIELD, *Landlord.*

mandatory in its terms, those terms must be observed: *Mountcashell* v. *O'Neill* (1); *Bernard* v. *Conner* (2). The letting may be good as between the lessee and sub-tenant, and void against the landlord, *Troy* v. *Kirk* (3).

If it is sought to bind a party on the construction of a deed by a statement in it, very clear language is necessary: *South Eastern Railway Co.* v. *Warton* (4). Even if the consent is within the statute of Geo. 4, there is no estoppel. Secondly, the consent here was given by a tenant for life; that does not bind the remainderman.

Gordon, Q.C., and *Cuming*, for the tenant:—

The consent given by the agent to the subletting is sufficient to bind the landlord within the 7 Geo. 4, c. 29. The form of the consent endorsed on the assignment, coupled with the parol evidence, shows that the agent had actual knowledge of the sublettings. The lessee was charged for the cottages occupied by the sub-tenants.

A consent to a subletting by a tenant for life will bind the remainderman. The judgments in the Court of Appeal in the former branch of the case proceed upon the basis that the landlord was estopped from denying that these sub-tenancies were valid in law.

April 27.

FITZGIBBON, L. J.:—

The objection made to the tenant's fixing a fair rent is that he is not *bona fide* in occupation of the holding. It is admitted that he is not physically in occupation of the whole, but that three distinct portions are held and occupied by his sub-tenants. The question, therefore, is whether he is to be "deemed" to occupy the portion which is in the hands of the sub-tenants, by virtue of the proviso in the Act of 1881, sect. 57, that where the tenant has sublet part of his holding with the consent of his landlord, he shall, notwithstanding such subletting, be deemed to be still in occupation of the holding.

(1) 5 H. L. Cas. 937.
(2) 1 Alc. & Nap. 237.
(3) 1 Alc. & Nap. 230.
(4) 6 H. & N. 520.

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Fitz Gibbon, L.J.

Although we are not called upon to go in detail through the evidence, we must be clear as to the facts on which our judgment is based. When the case was before us on the former occasion, there were seven portions of the holding occupied by under-tenants. Three under-tenancies were then specially mentioned, but there has been some little confusion about them. Three under-tenancies, created between the date of the lease of 1828 and the assignment of 1878, and existing at the date of the assignment, had continued up to the time when the case was before the Court. It is to these three holdings, and to them alone, that we have now to look. But there were then subsisting three other sublettings of land which had been in the hands of under-tenants before and in 1878, but had afterwards come back into the lessee's hands, and had been again sublet to other under-tenants, who were in occupation when the originating notice was served. These three, with a fourth subletting, made after the assignment, of land not previously sublet, were held fatal to the tenant's claim on the former occasion.

Bewley, J., has distinctly stated, and our decision proceeds entirely upon the assumption, that these last four subtenancies have all now been determined, and that the only portions of the holding which are now in the hands of under-tenants, are the same three portions which were in the hands of under-tenants before the assignment in 1878, that there has been no fresh subletting of any of them, and that the very same subtenancies still continue in them which were in existence in 1878. When Mr. Meredith said that there was no proof of this, we told him that we must deal with the case on the basis of fact which the Court below stated, without contradiction, to have been proved. We assume, therefore, that the only three sublettings which now exist were created before 1878, and have continued ever since, the only change being in the names of the sub-tenants for the time being. These being the facts, the case raises several important questions.

The first point is that there is no writing signed by any landlord, the only writing relied on as a consent being signed by an agent, describing himself as such. Some statutes, *e.g.* the Landlord and Tenant Act of 1860, sect. 10, which require written evidence

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under the hand of a principal or his agent, expressly provide that the agent's authority shall also be in writing. But this is not the general rule, and *prima facie* the authority given to an agent need not be in writing, to make what must be testified by writing binding upon the principal. The Statute of Frauds is a familiar instance. Is there, then, anything in the Subletting Act to make the written consent of an agent insufficient to bind the landlord, where the agent is himself authorized by parol only? In my opinion, there is nothing to exclude the application of the general rule—*Qui facit per alium facit per se.* If you give authority to another to sign a paper in your name, or on your behalf, his signature is in law yours. Companies must do nearly everything by their servants; most employers do many things through their agents.

Morton v. *Copeland* (1) is only one of several authorities to show that the general rule applies, even when a given person's consent in writing, and his signature, are required by statute. Unless there is some express enactment that the party shall sign with his own hand, the consent signed by an agent will satisfy even such a statute, and I can find nothing in the Subletting Act to show that an authorized agent's signature is not enough. It is certainly enough upon a notice to quit, or upon a bill of exchange—why not upon a consent to a subletting?

Mr. Meredith contended that the express mention of the agent in the Act of 1860, sect. 10, showed that he could not give the consent required by the Act of Geo. 4, in which the landlord only is mentioned. We cannot read the Act of 1860, although it is *in pari materia*, as implying that the landlord in person, and he only, could sign an effective consent under the previous Act of Geo. 4. It is impossible to restrict the interpretation of the earlier Act by the later one, where the general rule is the other way.

Mr. Meredith relied on the absence of authority. But on a point of this kind, absence of authority is a two-edged argument. If I were to speculate, I should say that it is probable that hundreds of consents have been signed by agents in the management of Irish estates for every one which has been signed by a landlord in person. We are not ignorant of the universality of

(1) 16 C. B. 517.

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the habit in this country of entrusting the management of large estates, and even of small ones, to agents.

For these reasons we are of opinion that the agent's signature is sufficient, provided always that the agent had, in fact, authority to sign. As to the fact of authority, we do not depend, as Mr. Meredith said we must, on presumption. I am willing to admit that the tenant was bound to give evidence of Doyle's authority, but there is ample evidence of it. The document itself contains the words "John B. Doyle, agent for Thomas Christy Wakefield." There is parol proof connecting Doyle with the management of the estate for the landlord, such as that he was receiving the rents, and performing the ordinary duties of an agent, at the very time of the assignment. There is further evidence that Doyle was aware of the existence of the sub-tenancies, and knew that the sub-tenants were in occupation. Further, there is evidence that Robinson was treated as the assignee, and that rent was taken from him by Doyle as agent for the landlord, acting as such in the ordinary discharge of an agent's duties, and acting as such in the very matter of the assignment. There is ample evidence that Doyle was the authorized agent of the landlord for ordinary purposes, and there is some evidence that he was authorized to sign the document which was endorsed on the assignment, and there is no evidence at all to the contrary.

That brings us to the next question, namely—Whether Doyle's principal, being only a limited owner, was able to sign a consent valid to bind his successors? Mr. Meredith contended that he was not, and that section 57 of the Act of 1881, which defines "landlord" to mean "the immediate landlord or the person for the time being entitled to receive the rents, and includes the successors in title to a landlord," either does not apply, or does not include a limited owner who was a predecessor in title. In my opinion this construction of the definition is too narrow, but how can we get over the words of the Subletting Act itself which refers to the landlord, his heirs, executors, administrators, or assigns? I cannot follow Bewley, J., in putting the effect of the consent upon estoppel only. He says that "although Thomas Christy Wakefield, junior, may have been estopped by his conduct from disputing the validity of the sublettings made prior to the assignment,

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or from alleging that they had been made without the consent of the landlord for the time being, the present landlord, who was not a party to the acts that gave rise to the estoppel, nor a privy in estate, cannot held be bound by the estoppel." The consent was given by the person who represented the landlord's estate at the time; and it is impossible to hold that the landlord for the time being, if he be a limited owner, cannot give a valid consent under the Subletting Act. This would inevitably lead to the conclusion, contrary to practice and authority, that there can be no valid assignment or subletting at all, unless the consenting landlord is an absolute owner in fee, or is acting under some power.

The only remaining question is whether the endorsement on the assignment is a sufficient consent within the meaning of the Act. We can presume no other consent, and the Land Commission could not go outside that document for evidence of the required consent. *Cairncross* v. *Lorimer* (1), and the class of cases to which it belongs, have no application to a statutory provision like that with which we have to deal. Estoppel on the ground of equitable fraud cannot get rid of a statutory prohibition. Christian, L. J., expressed this forcibly when he described the authority which enabled the vendor in such a case to treat his own assignment as void as a *reductio ad latrocinium* of the decisions on the Subletting Acts. Is this document, as a question of construction, a consent in writing to the sublettings then in existence? The consent is to an alienation of the grantee's interest in the sub-lease, and to the conveyance thereof to Robinson. The proviso merely prevents it from being a waiver of anything further. The sale and alienation of the grantee's interest, and the conveyance of the grantee's interest to Robinson, as they are carried out in the body of the deed, are the subject of the consent. The thing conveyed is thus described:—"All that and those that farm tenement and parcel of land in Derryean, otherwise Derrinean, together with all houses and buildings thereon, as the same was formerly in the possession of James Woodhouse, deceased, and *now in the actual possession of Thomas Atkinson and his undertenants*, containing 54A. 3R. 22P. English statute measure."

(1) 3 Macq. H. L. 827.

When Doyle endorsed his consent to the assignment upon the conveyance, he must have knowledge imputed to him of what the thing conveyed by the within deed was. As a general rule, parcels must always be identified by parol evidence. If a question arose as to the lands "formerly in the possession of James Woodhouse," parol evidence would be admissible to identify them; and when the deed goes on to describe the land as in the possession of the grantor and "his under-tenants," parol evidence of who the under-tenants were, and of what lands they were in possession, would be equally admissible. There is actual evidence that Doyle knew the sub-tenants and their holdings, and that he received a fee of 2*s.* 6*d.* for entering a record of each cottier's house for a number of years. Knowing the existence of these under-tenancies, and knowing the land to be occupied under them, he consented in writing to the assignment of the reversion upon them. It follows that the property to be assigned depended for its existence on his consent to the existence of the under-tenancies. It has long since been settled that the validating consent may be given *ex post facto*, and at any time, and I have no hesitation in holding that, as matter of construction, a consent to the assignment of anything is a consent to the existence, and so to the creation, of the thing assigned.

If the lease had contained a covenant or condition against breaking up a particular field without the landlord's consent in writing, with a forfeiture clause, and the landlord endorsed his consent upon an assignment of the lease, which recited that the field in question had been broken up, could there be a question that the landlord's consent covered the breaking up? How would the case differ if the assignment described the field as "now ploughed up"? Again, if a lease contained a covenant not to build any house on the land, and the consent of the landlord was endorsed on an assignment of the land "with the house since built and now standing thereon," would not this be an express assent to the building? Yet these instances are not clearer than the present one. Previous knowledge is proved, and the sublettings are recognised in writing as subsisting things assigned with written consent. This document is, therefore, a consenting recognition of the sublettings which the parol evidence identifies

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as having been subsisting to the landlord's knowledge at the time. Subsequent consent is enough. Consent by an agent is enough, and the tenant is therefore entitled to be deemed to be still in occupation.

FitzGibbon, L.J.

I wish to add, that when the case was here before, expressions were used by all the members of the Court as to the three old sublettings, which would make it seem very unjust if the tenant were to be now excluded by reason of them. I, at least, then as now, treated the landlord's dealings with the assignee as evidence of consent to the sublettings prior to the assignment, and no idea of mere estoppel was suggested by me. I said "all the evidence given in this case of the landlord's conduct respecting the portions of the holding of which the tenant is not in occupation amounts only to this:—1, *evidence of consent to the sublettings made prior to* 1878, in that the assignment then made to the present tenant recognised those sublettings, and the landlord assented to that assignment." That is the principle of my judgment now; viz. that the landlord, by consenting to the assignment, consented to the sublettings the reversion upon which was assigned. The fact that the landlord was a limited owner makes no difference, when there is a sufficient consent.

BARRY, L. J.:—

I concur with the judgment of FitzGibbon, L.J., on the two main points under discussion. In the first place I am of opinion that the signature by the agent to the assignment was sufficient. I think that the general rule of law applies—*Qui facit per alium facit per se.* The *onus* lay on Mr. Meredith to satisfy us by authority or reasoning that there was an exception in this case. Save for the fact that in this country every case of landlord and tenant is supposed to be an exception to the general rule, no ground of exception was put forward. The signature, therefore, of an authorized agent of the landlord was sufficient.

Then as to the next question—I am of opinion that this was a sufficient consent within the statute of Geo. 4 to validate the transaction. I put it on no presumption, not on the question whether there is evidence of a lost deed, but on the broad ground,

whether it is a question of fact or law, or a mixed question of fact and law, that the writing signed by the agent was sufficient.

WALKER, L. J.:—

I concur as regards the two points with which our judgment deals. Of course we must have such a consent as to make this in law a valid subletting under the Act of Geo. 4.

As to the first point—Whether the signature of the agent to the assignment is sufficient? The Act of Parliament says that there must be a consent by the lessor testified by his consent in writing. Does that involve that it must be a personal act by the lessor? The general rule of law applicable to the construction of a statute which requires the consent of a party, is that the maxim *Qui facit per alium facit per se* applies, unless there is something in the words of the enactment to show that it must be signed by the party, here the landlord himself, or something in the subject-matter to show that the act must be a personal one. This statute requires the consent to be given by the landlord, his heirs, executors, or administrators. It was held in the case of *Morton* v. *Copeland* (1), that where the Dramatic Copyright Act required the consent of the author, the consent required need not be given by the author personally. The Act required that the consent of the author should be in writing, but it was held that the consent of an agent was sufficient to satisfy those words.

As to this being a personal act from the nature of the subject-matter I do not think that there is anything to make it so. In this country the business of the management of landed property is almost all carried on by agents. There is nothing, therefore, in the language of the statute, or the nature of the property itself, to prevent an authorised agent from giving a consent for his principal.

As regards the other question—Did the lessor, through his agent, agree to the lettings made? It is not necessary that the consent should be given before the subletting, it may be given at any time; it need not be addressed to the under-tenant, or given in any particular form. I do not intend to go at length into this

(1) 16 C. B. 517.

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part of the case again, as FitzGibbon, L. J., in his judgment has dealt with it so fully. The landlord knew of these sublettings. It appears that there was a penalty provided in case a subletting was made. This might have been enforced by Thomas Christy Wakefield, who was in possession as landlord for a very long time. We have the holding formerly in the possession of Woodhouse, and now in the possession of Robinson. Actual knowledge must be imputed to the agent of that clause and what it contained. He sanctioned the alienation of the grantee's interest by the endorsed consent, which, as I interpret it, means "I sanction the assignment to you of the reversion of that portion which is sublet, and the possession of the other portion." I do not think that it was confined to then legally existing sublettings.

Solicitor for the appellant: *J. B. Atkinson.*
Solicitor for the respondent: *A. T. Farrell.*

R. D. M.

Q. B. Div. 1896. Dec. 10.

LOUGHREY *v.* MAGUIRE (1).

(1896. No. 9372.)

Practice—Action to recover possession of land for non-payment of rent—Counterclaim—R. S. C., Order XIX., Rule 3.

Where, in an action to recover possession of land for non-payment of rent, the defendant traversed the contract of tenancy, and counterclaimed for damages for breach of that contract, and it appeared that there was no defence to the claim for possession, the Court, upon the refusal of the defendant to withdraw his defence, ordered the counterclaim to be struck out.

MOTION on behalf of the plaintiff to exclude or set aside the defendant's counterclaim in the action on the ground that the same was embarrassing, and could not be conveniently disposed of in the action.

The action was brought to recover possession of certain premises

(1) Before O'BRIEN, HOLMES, and GIBSON, JJ.

for non-payment of the rent thereof, the statement of claim averring that the premises (a house) were held by the defendant under a subsisting contract of tenancy, at the yearly rent of £40, that the defendant was in possession under the said contract, and that one year's arrear of the rent was due. The defendant delivered a statement of defence and counterclaim, traversing (in paragraph 1) the contract of tenancy, and counterclaiming (in paragraph 2) for £36 5*s.* for money paid, and for money due on account stated, and (in paragraph 3) with an admission for the purposes of the counterclaim of the tenancy as alleged, pleading that it was a term of the contract of letting that the plaintiff should repair and put into a thorough state of repair the inside and outside of the house so let, which the plaintiff had neglected to do, and claiming—(*a*) £36 5*s.* under paragraph 2, and (*b*) £100 damages under paragraph 3, and costs.

[It was conceded that the counterclaim for money paid must be struck out.]

Denning, for the plaintiff, referred to *Carew* v. *Christopher* (1); *Hildige* v. *O'Farrell* (2), and *Wilson* v. *Burne* (3). In no case of ejectment for non-payment of rent had a counterclaim of this kind for damages been allowed. It would be embarrassing to the plaintiff if the defendant, although he obviously has no defence to the original action were allowed to delay the plaintiff's right to possession by introducing a counterclaim, claiming relief of a wholly different character from that which the plaintiff in the original action was seeking. [O'BRIEN, J.: If the action and counterclaim went on to trial, and each party was successful, how could the Judge set off the judgment on the claim against the judgment on the counterclaim? In the former there was merely an ascertainment of the amount of rent due.] Counsel submitted that under the rule (R. S. C., Order XIX., rule 3), it was a matter altogether for the discretion of the Court to judge of the convenience or inconvenience of allowing the counterclaim to be disposed of in the pending action, and that

(1) 8 L. R. Ir. 252; 10 L. R. Ir. 38.

(2) 8 L. R. Ir. 158.

(3) 24 L. R. Ir. 19.

Q. B. Div. 1896.

LOUGHREY v. MAGUIRE.

Whitton v. *Hanlon* (1)—where the counterclaim was allowed upon the ground that the annuities due by the plaintiff to the defendant were charged on the plaintiff's interest in the premises sought to be recovered, and the arrear would more than satisfy the rent, and that the defendant could by other proceedings make those annuities applicable in discharge of the plaintiff's claim for rent—rested on the peculiar facts of that case. [JOHNSON, J., asked whether the defendant would consent to allow judgment to be entered in the original action without costs, and let the counterclaim proceed?]

Counsel for the plaintiff expressed his willingness to accept these terms.

Jefferson, for the defendant, stated that he could not without authority from his client give the consent suggested. He contended that the counterclaim in the present case was within the decision in *Whitton* v. *Hanlon* (1), where no less than here there was no defence to the claim for possession, yet a counterclaim was allowed so as to dispose, as provided by the Judicature Act, of all matters in controversy between the parties. There had been, and could be, no delay, notice of trial having been served for the present sittings. [HOLMES, J.: If there was a *bona fide* defence to the action, and also a counterclaim, the Court might then perhaps allow the counterclaim to proceed, but here there was no defence whatever, the counterclaim for damages being itself based on the very contract of tenancy which the defence denied.]

THE COURT ordered that the defendant declining to withdraw his defence to the claim in ejectment, the counterclaim should be struck out, with costs.

Solicitor for plaintiff: *R. F. Barry.*
Solicitors for defendant: *Bennett Thompson & M'Laughlin.*

A. E. R. J.

(1) 16 L. R. Ir. 137.

CONDON, APPELLANT; DUFFY, RESPONDENT (1). *Ex. Div.* 1897. Jan. 14.

Summary Jurisdiction (Ireland) Act, 1851 (14 & 15 *Vict. c.* 92, *s.* 10 (5)—*Public road—Obstruction—Grand Jury Act* (6 & 7 *Wm.* 4, *c.* 116, *s.* 119) *—Trackway—Unloading of timber.*

The statute 28 Hen. 8, c. 22 (Ir.), after providing for the passage of boats, merchandises, &c., along the River Suir, enacted that boatmen, merchants, and others should have, if needful, 7 feet of plain ground on each side of the said river, for the drawing, taking, loading, &c., of boats, without any impediment on the part of any person. The Grand Jury for the South Riding of County Tipperary, acting under the provisions contained in 6 & 7 Wm. 4, c. 116, as amended by 36 & 37 Vict. c. 34, presented and expended £100 a-year in keeping the said way in repair (and in their presentment described the said way as a "trackway"), so far as was required for the haulage of boats, but not for vehicular traffic. The appellant was prosecuted at Petty Sessions for depositing timber upon the public road (the said trackway) contrary to the provisions of 14 & 15 Vict. c. 92, s. 10 (5). On the said hearing it was proved that, although the appellant deposited the timber on the trackway, the timber so deposited did not interfere with the haulage of boats.

The Justices held (*inter alia*) that the trackway was a public road within 14 & 15 Vict. c. 92, and convicted the appellant:—

Held, on case stated, that there was no evidence that the said trackway was a public road within 14 & 15 Vict. c. 92, and that the conviction was wrong, and should be reversed.

CASE STATED by Justices under 20 & 21 Vict. c. 43, as follows:—

At a Petty Sessions, holden in and for the Petty Sessions district of Clonmel (rural) County Tipperary, on 27th November, 1896, before the Justices then present, P. Condon, the above-named appellant, was charged as defendant in and by summons in which Head Constable Duffy, R.I.C. (the above-named respondent) was complainant, for that "at Ferryhouse, in the county of Tipperary, on the 21st November, 1896, he the said defendant did lay timber on the public road (the river trackway) there situate, contrary to law"; and the said parties being then

(1) Before PALLES, C.B., and ANDREWS, J.

Ex. Div. 1897.

CONDON, *Appellant*; DUFFY, *Respondent.*

present, and the defendant being represented by Mr. D. J. Higgins, solicitor, the charge was duly heard, and upon such hearing the Justices adjudged as follows:—

Defendant convicted of said offence, and ordered to pay for fine the sum of one shilling; and for costs the sum of one shilling and sixpence—in default a warrant to distrain to issue.

Upon the requisition of the appellant Condon, the present case was stated.

Upon the hearing of the said complaint the complainant put in evidence "an abstract of presentments passed by the Grand Jury of the South Riding of the County of Tipperary at Summer Assizes, July 2nd, 1895," containing the following statement at page 86, under the heading "Section 4, Presentments granted at Summer Assizes, 1895."

TRACKWAY CONTRACT.

Originally granted at Summer, 1894, for five years and a-half.

6 & 7 Wm. 4, c. 116, s. 56.	280	Patrick Walsh, Kilsheelan, to repair 3760 perches navigation trackway, Clonmel to Carrick-on-Suir, between Clonmel borough bounds and the wall at Cottage (Carrick). Securities—M. Molaughney, Ballyknocken, and J. Russell, Clonmel. Materials—470 cubic yards of stone yearly.
36 & 37 Vict. c. 34, s. 1.		£100, payable by eleven half-yearly instalments (half of riding at large), £25.

The complainant on being examined stated that on the day in question he saw defendant and three or four other men unloading timber on the trackway of Ferryhouse, and depositing it there so that it occupied a width of 8 or 9 feet. Half the trackway seemed to be covered by the timber. The trackway was cut up owing to this timber being drawn over it so that in some places the wheels of the carts used to be sunk almost to the axles. There were about three boatloads of timber deposited on the trackway at the time he visited the place. Upon cross-examination the witness stated that he was only about twelve months in the district; he only saw the timber placed there for the first time last Saturday, and that the public could not walk on the trackway owing to the state it

was in consequent upon the timber being drawn over it and deposited upon it. He saw parties obliged to walk on the kerbstone of the quay, and he had to get into the mud on the trackway to allow ladies to walk on the kerbstone. The trackway was bounded by a fence, and the timber was placed outside that fence, and covered half the trackway. He held that the trackway was a public road. He could not say how long the timber was piled up there.

The Rev. J. Harrington, manager of St. Joseph's Industrial School (the land attached to which immediately adjoins the trackway) deposed to about 100 tons of timber being placed on the trackway and allowed to remain there for a considerable time. He had protested against the owner of the timber storing it on the trackway to the injury of the fence of the grounds attached to the Industrial School. The trackway was impassable where the timber was placed, and no one could pass there without danger; the kerbstones were giving way, and the place was in a most scandalous state. He had a number of people employed who used this trackway as a promenade, and as a short cut to the town, but it could not now be so used by passengers without danger to their lives, especially on dark evenings. The timber stored in the trackway prevented his men from using it for receiving coal and other things required for the school.

The Borough Surveyor of Clonmel deposed to examining the place and finding the trackway "cut up" for a distance of about 180 yards, and some of the ruts were 15 inches deep.

The County Surveyor of the South Riding of County Tipperary deposed that the Grand Jury spent £100 a-year on the repair of the trackway, but that was not sufficient to keep it in a suitable condition for vehicles. He intended the repairs to be such as would make the trackway suitable for the haulage of boats by horses. There were parts of it in a bad condition regarding it as a public road, but the haulers were pleased with it as they only wanted foot-holding for their horses. With regard to placing timber on the trackway as long as it was used in a fair way he never took the initiative in raising any objection. He laid it down that so long as there was a space of about 10 or 12 feet left for the use of the public that would be ample; he considered it benefited

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traders and the public generally to allow timber to be piled on the trackway provided that that was done fairly. There were no spaces set apart where timber could be deposited the same as were provided for metal on the side of the public roads, and there was no rule made by the Grand Jury providing for such spaces. The trackway was the space between the fence and the edge of the river, and was in width from 10 to 30 feet.

On the part of the defendant it was contended that—

1. The place was not a public road within the meaning of 14 & 15 Vict. c. 92.

2. It was a trackway or towing-path for the purposes of navigation only; and the Irish Statute 28 Hen. 8, c. 22, defined the purposes for which the trackway was intended.

3. The said Irish Statute 28 Hen. 8, c. 22, gave the public for the purposes of navigation only 7 ft. (or more if required) of plain land on either bank of the River Suir to enable mariners and others to draw, take, load, or convey their boats.

4. The placing of the timber as complained of was necessary for the loading of it on to boats moored in the river along the trackway, and awaiting loading.

5. There was sufficient room left along the trackway for persons to haul boats either by hand or with horses.

6. The county surveyor proved that the space of 10 or 12 ft. was sufficient for the purposes of hauling.

7. The statute 6 & 7 Will. 4, c. 116, sect. 119, gave grand juries power to expend money in the repair and widening (to an extent not beyond 15 ft.) towing-paths and trackways on the banks of navigable rivers on which boats had been accustomed to be towed by horses (excluding places where tolls were charged), and the Act 36 & 37 Vict. c. 34 continued those towing-paths and trackways in the same character as heretofore, that is, as places devoted to certain public purposes over which the public has no rights except for these specific purposes, and which could not be regarded as highways, except for the purposes of navigation.

8. The fact of the Grand Jury presenting under sect. 119 of the Grand Jury Act (as amended by 36 & 37 Vict. c. 34) did not constitute the trackway a public road.

9. Such trackway so provided for by Act of Parliament and

maintained, used and intended as aforesaid, could not be a public road within the meaning of the statute 14 & 15 Vict. c. 92.

In support of this contention evidence was given by Mr. J. E. Grubb (boat owner) that the trackway was regarded only as a towing-path for the purpose of hauling boats. That the timber at the place in question did not interfere with the hauling of boats. That it was necessary to have timber lying there for days and weeks, because vessels had to be chartered to carry it from Waterford to England, and it could not be carried down the river until the vessels were ready to receive it. That sometimes, owing to floods, it was not possible to load the boats until the floods had subsided. There was no trackway on the side of the river opposite to that on which the timber was placed, but boat owners had a right to use it for the purposes of navigation, and had in fact so used it when occasion required.

The Justices were of opinion—1. That the trackway at the place in question is a public road regularly fenced off from the land adjoining, and devoted exclusively to public purposes, and was clearly within the definition contained in sect. 25 of the Act 14 & 15 Vict. c. 92.

2. That the trackway is not confined to a width not exceeding 15 ft., but varies in width from 10 to 30 ft., all repaired by Grand Jury presentment.

3. That the defendant on the day in question did not use the trackway for loading a boat, but that he placed the timber upon it for the purpose of storing same, and in contravention of the statute.

The said Justices gave judgment against the defendant as aforesaid, and thereon required the judgment of the Court as to whether they were correct in point of law in their determination as aforesaid, and as to what should be done on the premises (1).

Brett (with whom was *Ryan, Q.C.*), for the appellant:—

The prosecution was laid under 14 & 15 Vict., c. 92 sect. 10 (5), which deals with offences committed on "publi

(1) There were five Justices presiding, and two of them dissented from th above decision.—[REP.]

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roads"; and section 25 interprets "public road" to include "highway." There is no definition in that Act of "public road" or "highway." The meaning of "public road" must be sought in the Grand Jury Act (6 & 7 Wm. 4, c. 116); and, although that Act does not contain any definition of the expression, the expression "road" or "public road," occurs in twenty sections, and the expression "trackway" occurs only in one section, namely, the 119th, thereby showing that the term "public road" must be read in contradistinction to "trackway."

In *Re Leitrim Presentment* (1) Mr. Justice Andrews held that in deciding whether or not a public way was a "public road" within the meaning of section 50 of the Grand Jury Act, three tests should be applied, and the application of any one of them to the particular case would be sufficient to enable the Court to deem the way a "public road." The tests were as follows:—(1) that the way was originally made by the county; (2) that it was dedicated to the public; and (3) that it was sometime under county presentment. There was no evidence that the trackway was originally made by the county, there was no evidence that there was any dedication to the public, express or implied, and as to the county presentment, it was made under section 119 (as amended by 36 & 37 Vict., c. 34), as a *trackway*, and not a "public road" under section 50. Therefore, none of the three tests laid down by Mr. Justice Andrews are applicable to the present case. Nor can it be said it is a "highway," which must be a way open to the unrestricted use of all the Queen's subjects, as to which there was no evidence: *Doraston* v. *Payne* (2). Therefore it is neither a "public road" nor a "highway," and therefore no offence was committed within the meaning of the Summary Jurisdiction (Ireland) Act, 1851.

The statute 28 Hen. 8, c. 22 (Ir.), after making provision for the passage of boats, merchandises, &c., along the "Barrow, the Noyre, the Suyr, and the Rie," provides (section 4), that boatmen, &c., should have if needful seven foot of plain ground on each side next the said rivers "for the drawing, taking, loading and conveying of the said boats, scoutes, wherries, clauraus,

(1) 28 Ir. L. T. R. 139. (2) 2 Smith's L. C. 157.

cottes, and other vessells, and everie of them, without any impediment, let, vexation, disturbance, or unquitnesse of any the possessioners or inheritors of the said lands, or any part of them, or any person or persons." Section 119 of the Grand Jury Act enabled Grand Juries to present moneys to repair or widen to a width not exceeding 15 feet "any towing-path and trackway on the bank of any navigable river," which would plainly apply to the trackway in question. That provision was subsequently amended by 36 & 37 Vict., c. 34, but merely so far as the area of levy is concerned. It is therefore plain it is merely a trackway, and presumed to be, and presented for, as such. It is therefore not necessary to argue the other questions which do not arise if the Court be of opinion that the place is not a "public road."

There was no appearance for the respondent.

THE COURT reversed the decision of the Justices with costs.

The following is the curial part of the order:—

> "THE COURT, being of opinion that there was no evidence before the said Justices that the trackway in question was a public road within the meaning of the statute 14 & 15 Vict. c. 92, and that the said Justices were wrong in their determination, as mentioned in the said case, doth hereby reverse the decision of the said Justices, with costs, and doth order that the said respondent W. Duffy do pay to the said appellant P. Condon the said costs and also the costs of the said case stated and of the argument thereof, when taxed and ascertained."

Solicitor for the appellant: *D. J. Higgins.*

J. P. B.

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O'CONNOR *v.* IRELAND (1).

(1895. No. 5181.)

Practice—Garnishee order—Prior charge on interest of judgment debtor—Tenants' rents—Receiver.

A garnishee order only binds the attached debt to the extent to which the judgment debtor himself can deal with it.

A judgment creditor obtained a conditional order attaching the tenants' rents of the lands of C., payable to the judgment debtor. The Commissioners of Public Works were entitled to a charge on the lands, created in 1880, under the Relief of Distress (Ireland) Act, 1880, and the 37th section of 10 Vict. c. 32 incorporated therewith; and before the conditional order was made absolute the Commissioners obtained in the Chancery Division an order for a receiver over the lands of C., and obtained leave to show cause against the conditional order:—

Held, that the conditional order should be discharged.

CAUSE SHOWN against making absolute a garnishee order.

On 23rd January, 1896, the plaintiff obtained judgment for £54 16*s.* 10*d.* debt (including costs), and on 25th November, 1896, obtained a conditional order for a garnishee attaching several sums due and payable by the several respective persons named in the schedule to such order. The said several persons were tenants to the judgment debtor of portions of the lands of Clonkeen, county Galway, and the sums respectively set opposite to their names were due and owing to the judgment debtor as and for rents for their respective holdings. The affidavit upon which the conditional order was granted did not disclose that there was any outstanding charge or incumbrance affecting the said lands, nor did it disclose that there were any proceedings pending in the Chancery Division relative to the sale of the said lands, or the appointment of a receiver over them. The Commissioners of Public Works in Ireland who were not named in or served with the conditional order applied to Mr. Justice Murphy, and obtained

(1) Before ANDREWS, J.

leave to show cause against making absolute the said order; and accordingly on the 11th January, 1897, filed an affidavit by way of cause, which was as follows:—The deponent, who was an officer of the department, deposed: 1. That the Commissioners of Public Works, acting under the provisions of the Relief of Distress (Ireland) Act, 1880, with which is incorporated the Landed Property Improvement Act, 1847, advanced by way of loan £350 to James Davies, which loan was by order dated 30th July, 1880, charged upon the lands of Clonkeen, in the barony of Killion, and county of Galway, and said loan became repayable by a rentcharge calculated at the rate of £3 8*s.* 6*d.* per cent. per annum as by the said Acts is provided.

2. That arrears amounting to £98 4*s.* 2*d.* to the 5th April, 1896, were due to the said Commissioners on foot of said rentcharge.

3. That the said J. Davies was since deceased, and the abovenamed judgment debtor succeeded to his interest in the said lands.

4. That in July, 1896, proceedings for the appointment of a receiver for the recovery of said rentcharge were commenced in the Chancery Division; and on the 28th October, 1896, the petition was fiated by the Right Hon. the Vice-Chancellor. Owing to the difficulty of ascertaining the whereabouts of the judgment debtor it was not possible to bring the matter before the Court during the last sittings, but the petition and notice of motion have been served, and the application would come before the Right Hon. the Vice-Chancellor on the 11th January, 1897.

5. That the rentcharge payable to the Commissioners of Public Works was prior to all other incumbrances save quit and Crown rent and rentcharge in lieu of tithes, as is provided by the 38th section of the Landed Property Improvement Act, and that the said tithe rentcharge so payable out of the said lands was many years in arrear.

6. That the plaintiff, as solicitor for the said James Davies, filed a petition for sale of the lands in the Land Judges Court, and in connection with those proceedings and pursuant to the direction of the Court, served the Commissioners of Public Works with the conditional order for sale.

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No affidavit was filed in reply; but the plaintiff moved to make absolute the said conditional order.

On the 11th January, 1897, the Vice-Chancellor made an order for the appointment of a receiver over the said lands of Clonkeen upon the petition of the Commissioners of Public Works.

Bartley, in support of the application:—

Rents may be attached, though there be a prior mortgage: *Patterson* v. *O'Reilly* (1); and *Campion* v. *Palmer* (2). The statute 10 Vict. c. 32, sect. 39, provides for the recovery of the rentcharge, and the plaintiff obtained his conditional order before the Commissioners obtained the order for appointing a receiver. Until the receiver be actually appointed he has no title to the rents. The rentcharge is an equitable charge only, and the defendant has still the right of receiving the rents, subject, of course, to their being attached at the suit of some judgment creditor. Besides the Commissioners, even as mortgagees, have not served notice of their intention to enter into possession as mortgagees; and until such notice is served, the defendant, as mortgagor, is entitled to receive the rents, subject, of course, to their being attached as in the present case.

J. F. Vesey Fitz Gerald, *contra*:—

A Crown debt has priority over all other charges. It is plain from the facts of the case disclosed in the affidavit of the officer of the department, that all through the plaintiff was aware of the existence of this rentcharge; and yet no such disclosure was made in the affidavit upon which the order was grounded: *Patterson* v. *O'Reilly* (1) is distinguishable. The Judicature Act does not affect the rights of mortgagees as regards third parties. The plaintiff, himself a solicitor, had express notice of the prior charges; and it was his duty to have taken care to have informed the Court in the first instance, so that the Commissioners would have been served with the order. Instead of that, it was by a pure accident that the Commissioners heard of the proceedings, and then obtained leave to intervene. [Counsel cited *Collins* v.

(1) 10 L. R. Ir. 304. (2) [1896] 2 Ir. R. 445.

Thompson (1); *In re General Horticultural Company* (2): *Badeley* v. *Consolidated Bank* (3); *Attorney-General* v. *Leonard* (4); *In re Corley* (5); *Davis v. Freethy* (6); 10 Vict. c. 32, sect. 37.]

Bartley, in reply:—

Execution took place the moment the conditional order was served on the tenants; and the effect of serving the conditional order is to transfer the debt to the judgment creditor who has obtained the order: *Ex parte Joselyne* (7); *Re Henley* (8); *Tapp* v. *Jones* (9). The transference of the debt, coupled with the fact that the Board of Works served no notice on the tenants, or appointed a receiver, entitles the plaintiff to have the conditional order made absolute.

ANDREWS, J.:— Jan. 15.

This case came before me on cause shown against a garnishee order obtained by the plaintiff as a judgment creditor of the defendant on the 25th November, 1896, attaching certain rents due by tenants of certain lands of the defendant. Upon the service of that order those rents became bound in the hands of the tenants within the meaning of Order XLV., Rule 2. The affidavits upon which the garnishee order was made did not disclose the fact which the plaintiff had knowledge of, that the Commissioners of Public Works had a charge on the lands created in 1880, whereby, under the Relief of Distress (Ireland) Act, 1880, and the 37th section of the Act 10 Vict. c. 32, incorporated therewith, the lands became charged with an annual rentcharge payable to Her Majesty, to secure a loan then made by the Commissioners to a predecessor in title of the defendant, named Davies, which rentcharge was largely in arrear. The omission to disclose the existence of this charge was a very censurable one, but upon the evidence before me, I would not be justified in holding that it was *mala fide*.

(1) 13 Ir. C. L. R., App. li.
(2) 32 Ch. D. 512.
(3) 38 Ch. D. 238.
(4) *Ibid.* 622.
(5) 23 L. R. Ir. 249.
(6) 24 Q. B. D. 519.
(7) 8 Ch. D. 327.
(8) 26 W. R. 885.
(9) L. R. 10 Q. B. 591.

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The Commissioners having by accident heard of the garnishee order, got leave to show cause against it, and they are the only persons by whom cause was shown. In July, 1896, the Commissioners commenced proceedings by petition under the 39th sect. of 10 Vict. c. 32, for the appointment of a receiver of the rents and profits of the lands so charged, and upon the 11th January, 1897, an order was made upon that petition by the Vice-Chancellor for the appointment of a receiver who then became entitled as against Mrs. Ireland, the defendant in this action, to all arrears of rent unpaid when the receiver order was made: *Hollier* v. *Hedges* (1). Mr. Bartley, in resisting the cause shown by the Commissioners, referred to what was said by Lord Justice James in his judgment in the case of *Ex parte Joselyne* (2). The Lord Justice at p. 330 is reported to have said:—"The moment the order of attachment was served upon the garnishee the property in the debt due from him was absolutely transferred from the judgment debtor to the judgment creditor. The garnishee could then only pay his debt to the judgment creditor of his original debtor. The property in the debt was transferred, and there was a complete and perfect security the moment the order of attachment was served." Now if these words are to be taken as meaning what they appear distinctly enough to convey, they cannot be regarded as a correct statement of the law. The later case of *Chatterton* v. *Watney* (3) is inconsistent with what Lord Justice James would appear to have laid down; and in *Cooper* v. *Lawson* (4), the law on this subject as stated in *Chatterton* v. *Watney* (3) was acted on. Lord Justice Brett in the last mentioned case said at p. 261:—"The argument of the appellant went on the ground that by the garnishee order the debt is transferred, and he referred to the language of Lord Justice James in *Ex parte Joselyne* (2), as supporting this view. But the Judicature Act contains no words importing a transfer of the debt, and I think the Lord Justice when he said that the property in the debt was transferred was only using a colloquial expression which meant nothing more than that the debt was bound." Lord Justice Cotton said (p. 262), referring to the English General Order XLV.:—"The effect of a garnishee order

(1) 2 Ir. Ch. R. 370.
(2) 8 Ch. D. 327.
(3) 17 Ch. D. 259.
(4) 6 *Times'* Rep. 34.

is to bind the debt. . . . . There is nothing in the terms of the General Order to affect any security for the debt, it only takes away the right of the judgment debtor to receive the money and gives the judgment creditor a right to receive it. It has not the effect of transferring the security"; and Jessel, M. R., said (p. 262) that he quite agreed that a garnishee order does not operate as a transfer of the debt. The subsequent case of *In re Combined Weighing and Advertising Machine Co.* (1) came on upon appeal from Mr. Justice North, who when the case was before him said (p. 102):—"The case of *Chatterton* v. *Watney* (2) is I think a distinct authority that a garnishee order absolute has not the effect of transferring the garnished debt to the garnishor"; and in the Court of Appeal, Cotton, L.J., said (p. 104):—"I ought to mention the question as to whether this is an equitable assignment of the debt. Of course if there had been an order by the person to whom the debt was owing to pay to the petitioner, that would have been a good equitable assignment. But in my opinion a mere garnishee order attaching the debt and enabling the person who has obtained the order to give a good discharge does not come within the principle of equitable assignment, and therefore the petitioner cannot, under the doctrine of equitable assignment, claim to be a creditor in this case." Lord Justice Fry said (p. 105):—"The question I take it is, what is the meaning of the words, 'bind the debt in his hands'? Now it has been argued that it amounts to a transfer of the debt. If that was the meaning, it is remarkable that that word was not used, and that the Order does not say 'transfer' the debt; but further than that the whole scheme of the Order is inconsistent with its being a transfer of the debt."

There being then no transfer of the debt by the garnishee order, what is it that the garnishee order binds? I think the authorities show, as I also think one would expect, that the garnishee order only binds the attached debt in so far as the judgment debtor is entitled to deal with it, and does not affect the claims of creditors in whose favour he has charged it, even though they may not have given notice of their claims, and that no charge affecting the debt when the garnishee order is made is displaced by that order. I

(1) 43 Ch. D. 99. (2) 17 Ch. D. 259.

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do not think it necessary to refer to more authorities for this than the cases of *Re General Horticultural Company* (1); *Badeley* v. *The Consolidated Bank* (2); and *Davis* v. *Freethy* (3).

In the present case the defendant Mrs. Ireland, could, no doubt, have received and given a good discharge for the rents attached by the garnishee order had the Commissioners of Public Works not intervened, but by virtue of their rentcharge they were entitled to intervene, as they have done, at any time; and by obtaining a receiver, capture all unpaid rents for payment of their rentcharge which was a charge on the rents and profits of the lands long prior to the garnishee order, and to any right that order could confer. No order has yet been made for payment of the attached rents to the plaintiff the judgment creditor, and I shall not make any such order, as it would, in my opinion, be at variance with the rights of the Commissioners as they now exist; and I shall therefore allow the cause they have shown against payment of the attached rents to the judgment creditor, and I shall discharge the garnishee order with £5 5*s.* costs to the Commissioners.

Having regard to what I have said, it is unnecessary for me to decide whether, irrespective of what I have stated, the rentcharge in question has priority as a Crown debt over any claim by the judgment creditor under the garnishee order, with reference to which Mr. FitzGerald referred to the 37th section of 10 Vict. c. 32, *The Attorney-General* v. *Leonard* (4), and *Re Corley* (5).

Solicitor for the plaintiff: *J. P. O'Connor* (plaintiff in person).
Solicitor for the Commissioners of Public Works: *Sir P. Coll.*

J. P. B.

(1) 32 Ch. D. 512.
(2) 38 Ch. D. 238.
(3) 24 Q. B. D. 519.
(4) 38 Ch. D. 622.
(5) 23 L. R. Ir. 249.

DUBLIN CEMETERIES COMMITTEE, APPELLANTS; THE COMMISSIONER OF VALUATION, RESPONDENT (1).

Q. B. Div. 1896.

May 5, 6. June 8.

Poor rate—Exemption—Cemetery—Hereditaments "used exclusively" for charitable purposes—"Private profit or use"—Poor Law (Ireland) Act, 1838 (1 & 2 *Vict. c.* 56), *s.* 63—*The Valuation (Ireland) Acts*, 1852 *and* 1854 (15 & 16 *Vict. c.* 63, *s.* 16, *and* 17 & 18 *Vict. c.* 8, *s.* 2)—*Finality of the decision of the High Court on Case Stated under sections* 10 *and* 11 *of the Valuation Revision (Ireland) Act*, 1860 (23 *Vict. c.* 4)—*Statute.*

In 1830 certain lands near Dublin were vested in a Committee, to be held in trust to be used as a burial ground, the surplus income arising from burial fees, &c., after the payment of expenses, to be applicable, under the sanction of the Roman Catholic Archbishop of Dublin, to the maintenance of a certain Model School in Dublin, or schools of the same kind, or for the purchase and acquisition of other burial grounds, such surplus income to be handed over to the Archbishop, and to be applied by him towards the support of the school, "so long as" he "should think fit," and if he should think that "any other application" thereof should be made, the majority of the Committee, with his sanction, should have power to "determine on the future application of such moneys."

In 1846 the governing body was reconstituted as "The Dublin Cemeteries Committee," under statute (9 & 10 Vict. c. ccclxi), "for the maintenance, improvement, and extension of the cemeteries" (of Golden Bridge and Glasnevin). Section 14 of this Act provided that the Committee should maintain the cemeteries and chapels and buildings thereon, and authorised the sale of rights of burial; and section 20 enacted that the surplus income, if any, should "from time to time be applied in such manner as to the majority of the governing body should seem fit." By section 6 a power to make bye-laws for the better order of their proceedings, and the management and maintenance of the burial grounds, was conferred on the Committee. In 1876, by bye-laws purporting to be made under this section, it was provided that portion of the annual income arising from the cemeteries should be funded annually "for the purpose of making provision for the extinguishment of rents," and that after the surplus for each year should be ascertained, the same should be distributed amongst Dublin charitable institutions, with the approval of the Archbishop. Since that date all surplus—after payment of head-rents, fees to

(1) Before O'BRIEN, JOHNSON, and HOLMES, JJ.

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sub-committees, salaries, wages, and other outgoings, and after setting apart a certain portion of the residue, and investing same for the purpose of redeeming head-rents—was distributed among such charitable institutions. The revenues of the undertaking consisted as well of grazing rents for lands not yet appropriated for burial ground, and of interest on moneys so invested, as of burial fees, &c.

The Commissioner of Valuation having entered these lands upon the Valuation Lists as rateable, the Dublin Cemeteries Committee appealed to the Recorder of Dublin. They contended that, under the Irish Poor Law Act, 1838 (1 & 2 Vict. c. 56), s. 63, no burial ground or cemetery was rateable; that these lands and premises were within the exemption of that section, as being a burial ground from which "no private profit or use" was derived; and that they were entitled to have the same distinguished on the Lists as exempt, under section 2 of the Valuation Act, 1854 (17 & 18 Vict. c. 8), as being "exclusively used for charitable purposes."

On Case Stated for the opinion of the Queen's Bench Division:—

Held (O'Brien, J., *diss.*), that the hereditaments were not "used exclusively for charitable purposes" within section 2 of the Valuation Act of 1854; that, under the Private Act of 1846, there was no trust binding the Committee to apply the surplus profits of the undertaking in charity, the bye-laws above mentioned being *ultra vires*; that the application in charity of the whole or portion of the net profits of such an undertaking (whether this were done in the discretion of the governing body, or even in the execution of some trust binding them to make such application thereof) would not bring the undertaking within the provision of that section; and that, accordingly, the Commissioner of Valuation was correct in not distinguishing these hereditaments upon the Lists as so exempt.

Quære—How far is sect. 63 of the Poor Law (Ireland) Act, 1838, affected by the provisions of the Valuation Acts, 1852 and 1854?

Semble, the decision of the Divisional Court upon a Case Stated for their opinion upon a question of valuation or exemption, under 23 Vict. c. 4, ss. 10 and 11, though "final and conclusive on all parties as to amount," still leaves it open to a person assessed in pursuance thereof to question his liability when sued for rates.

CASE STATED by his Honor the Recorder of Dublin, pursuant to 23 Vict. c. 4, s. 10, for the opinion of the Queen's Bench Division, on the hearing, on the 20th May, 1895, before him at Quarter Sessions of an appeal, under 15 & 16 Vict. c. 63, from the valuation by the Commissioner of Valuation in Ireland of certain lands, hereditaments, and premises, belonging to the appellants, the Dublin Cemeteries Committee, situate in the townlands of Prospect, Slutsend, and Violet Hill Great, in the county Dublin.

In the Valuation Lists prepared by the Commissioner of Valuation for the year 1895 the Dublin Cemeteries Committee were entered as occupiers or immediate lessors of land and buildings to the total rateable value yearly of £1279. Of this sum £860 was assessed for land, £359 for buildings and offices; and £60 for labourers' cottages.

The grounds of appeal were thus stated in the Notice of Appeal to Quarter Sessions:—1, that the said lands and premises were exempt from rating as being a cemetery; 2, that the said lands were lands used exclusively for charitable purposes; 3, that in the alternative the assessment should be confined and reduced to such part of the lands, hereditaments, and premises occupied by the appellants as should alone be properly rateable under the statute. The third ground of appeal, however, was not proceeded with before the learned Recorder, counsel on both sides agreeing to take the opinion of the Court on the two first questions.

The facts as proved before the Court of Quarter Sessions, and set out in the Special Case, were substantially as follows:—

By an indenture dated 22nd December, 1828, Luke Teeling of Dublin, merchant, granted and assigned to the Most Reverend Daniel Murray (the Roman Catholic Archbishop of the Diocese of Dublin), the Very Reverend Patrick Coleman, D.D. (Roman Catholic Vicar-General of the said diocese), the Very Reverend Andrew Lube (Roman Catholic Dean of the said diocese), Daniel O'Connell, Nicholas Mahon, and Christopher Fitzsimon, all that piece or plot of ground part of the lands of Golden Bridge in the parish of St. James and county of Dublin, containing 1A. 3R. 29P., to hold the same for lives renewable for ever under a lease of the premises dated the 30th September, 1812, and a renewal thereof dated the 1st of July, 1828.

By indenture dated the 29th March, 1830, and expressed to be made between the grantees in the deed of the 22nd December, 1828, of the first part, the Reverend Francis Joseph Lestrange and others of the second part, and Michael Walsh and others of the third part, reciting that the premises conveyed by the said indenture of the 22nd December, 1828, had been purchased for the purpose of being converted into a place for burial, by funds which were entrusted to the parties thereto of the second part

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(Lestrange and others), as a Committee for the regulation and management of the same, and reciting that the said ground had been actually converted into a burial ground, and that various sums of money had been and were likely from time to time thereafter to be received for the privilege and right of burial therein, and that by the constitution of the said Committee the net proceeds of the said burial ground should be applied under the sanction of the said Archbishop and his successors to the promotion and support of a model school or schools in the nature of a model school or schools, and for the purpose of increasing burial grounds; it was witnessed that the said parties thereto of the first part did thereby declare that the indenture of the 22nd of December, 1828, and the premises therein mentioned were granted to and accepted by them upon and subject to the trusts thereinafter declared, that is to say, upon trust, *inter alia*, that the said premises should be held in perpetuity as and for a burial ground and for the purpose of the erection of one or more chapel or chapels and for the erection of tombs and other monuments which might be deemed proper to be erected thereon; that all rents payable in respect of the said premises, and all rent, fees, and emoluments, of what nature soever, arising out of the said burial ground and the right of sepulture or erecting tombs or monuments, should, after the payment of the expenses therein mentioned, become and be applicable, under the sanction of the Catholic Archbishop aforesaid and his successors, to the present or other model school or schools, or for the purchase and acquisition of other burial ground or grounds, as thereinafter expressly mentioned; that the treasurers thereby appointed and their successors should at the close of each three months pay off all rent, salaries, wages, and current expenses so far as the funds vested in them should enable them to do so, and should pass their accounts before a meeting of the parties to this deed, and should hand over any balance in their hands to the Catholic Archbishop or his successors, to be applied in manner thereinafter appearing; that the moneys so to be handed over to the Catholic Archbishop should be applied by him to the completion, support, and sustentation of the model school situate in Richmond-street, North, in the city of Dublin, so long as the said Roman Catholic Archbishop and his successors should think fit; and in

case it should appear to him or to his successors, and so long as same should remain in the nature of a model school, that any other application of such sums ought to be made, then a meeting of the parties to this deed should be summoned and held and the majority of persons attending such meeting should determine upon the future application of such moneys; provided, however, that no application of such future moneys should be made save such as should have the sanction of the Roman Catholic Archbishop for the time being; and in case the Roman Catholic Archbishop should happen to differ, then in such case only the moneys should be laid out by the treasurer in public funds, to accumulate until such time as an application thereof should be devised which should have the approbation of the majority of the parties to the said indenture and the sanction of the Archbishop. By the said indenture it was further declared that the parties thereto should have power to make bye-laws or regulations, so that same should not be contrary to or in any respect whatsoever infringe upon the matters thereinbefore declared or any of them.

By lease dated the 29th September, 1831, William Daniel and Francis Stewart granted and demised unto the said Reverend Francis Joseph Lestrange, his heirs and assigns, for lives renewable for ever, a plot of ground situate at the west side of the road leading from Dublin to Glasnevin, being part of the lands called Prospect, containing 9 acres statute measure, subject to the yearly rent of £94 10*s*.

By another indenture of the same date, and made between the said Reverend Francis Joseph Lestrange of the first part, the said Michael Walsh and others, being the Committee before mentioned, of the second part, and the said Michael Walsh and others of the third part: after reciting that the said part of the lands of Prospect had been taken for the purpose of being converted into a place of burial, in like manner and to all intents and purposes as the premises at Golden Bridge had been originally purchased, it was witnessed that the said Reverend Francis Joseph Lestrange did thereby declare that the said indenture of the 29th September, 1831, and the premises therein mentioned, were granted to and taken by him upon the trusts in the indenture now in statement declared.

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The trusts declared in this deed were similar to those declared in the indenture of the 29th of March, 1830.

Under the provisions of these deeds the cemeteries of Golden Bridge and Prospect, in the county of Dublin, were established and managed by the said Committee, and the rents, fees, and other moneys derived therefrom, after the payment of all expenses, were applied pursuant to the trusts hereinbefore mentioned.

By the Dublin Cemeteries Act, 1846, 9 & 10 Vict. c. ccclxi, passed for the maintenance and improvement of the said cemeteries, the several persons therein named and their successors were constituted the Committee or Governing Body of the said cemeteries under the name and style of the "Dublin Cemeteries Committee," to have and exercise the powers thereby given to them. By the 6th section of this Act the Dublin Cemeteries Committee were empowered to make bye-laws for the better order of their proceedings and the management and maintenance of the said burial grounds or cemeteries, and to appoint sub-Committees and pay certain fees to the members of such sub-Committees. By the 18th section they were empowered to sell the exclusive right of burial and the right of constructing any vault or place of burial within any such cemetery, with the exclusive right of burial therein in perpetuity or for a limited period. By the 20th section it was enacted that all the moneys which should arise by any such sale of any right or place of burial or any vault should be applied in the first place in paying the head-rents, fees, salaries, stipends and other charges and expenses which by virtue of this Act should from time to time be payable or otherwise incurred in carrying the same into execution, and the surplus of such moneys (if any) should from time to time be applied in such manner as to the majority of the said Governing Body should seem fit.

Bye-laws for the regulation and management of the Glasnevin Cemetery, purporting to be made under the powers conferred by this Act were framed and duly adopted at a general meeting of the Governing Body held on the 6th September, 1876, and entered in the books of the Governing Body. The 37th bye-law provided that "a proportion of the sums received for grants in perpetuity during each year, not less than one-fourth, shall be funded annually, immediately after the audit of the accounts, for the purpose

of making provision for payment or extinguishment of rents." The 38th bye-law provided that "after the application of moneys in manner provided by section 20, and when the accounts shall have been audited and the surplus (if any) at the close of each year ascertained, the Governing Body shall proceed to distribute same amongst the charitable institutions connected with the education of the poor in and near Dublin in such proportions as it shall see fit, the same to be submitted to the Catholic Archbishop of Dublin for approval, but no money shall be given for charity during the year nor until after the publication of the annual accounts."

In each year since the establishment of the said cemeteries, after the payment of all rent, salaries, wages, and current expenses, and after setting apart portion of the moneys derived from the said cemeteries for the purpose of purchasing the head-rents payable in respect of the lands now used for the said cemeteries, and for acquiring other lands for the purpose of extending the cemetery at Prospect, and for erecting from time to time necessary buildings, the entire surplus of the moneys or profits derived from the cemetery had always been applied to the maintenance of purely charitable institutions, consisting chiefly of schools for the education of poor children in the city of Dublin, including the school or schools representing the original school or schools in North Richmond-street; and, since the adoption of the bye-laws of 1876, the surplus so remaining had always been applied pursuant to bye-law 38.

A copy abstract of receipts and disbursements of the said Prospect and Golden Bridge Cemeteries for the year ending the 31st December, 1893, was given in evidence at Quarter Sessions, and accepted as a typical example of the regular annual accounts. From this abstract it appeared that, in the year 1893, a sum of £870 6*s.* 2*d.*—being the balance of profits over outgoings, including amongst such outgoings a sum of £1809 4*s.* 6*d.* invested in the purchase of head-rents, &c., and paid for building a new house for the superintendent and a further sum of £614 17*s.* 9*d.* invested in the purchase of certain stocks—was granted by the appellants among some forty Charitable Educational Institutions.

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Since the first portions of the lands of Prospect were acquired under the deed of 29th September, 1831, adjoining portions of these lands were acquired in the years 1838, 1849, and 1852, respectively, for the purpose of extending the cemetery, and all the said lands were incorporated into and now form part of the cemetery. In the year 1861 the appellants, for the purpose of further extending the cemetery, acquired part of the lands of Violet Hill Great, portion of which was also incorporated into and now forms part of the cemetery. Another portion is covered by the premises known as Clareville, the residence of the superintendent of the cemetery. In the year 1873 the appellants acquired, for the purpose of extension, the lands of Slutsend and Westfarm, portion of which now forms part of the cemetery, and another portion of which is occupied by cottages erected by the appellants for the labourers necessarily employed in the cemetery. In the year 1878 the appellants acquired for similar purposes of extension the lands of Violet Hill Little. Part of these last-mentioned lands had not yet been actually included in the cemetery, being let each year for grazing by the appellants until such time as they should be required for the purpose of further extending the cemetery, the moneys derived from such lettings being treated in all respects in the same manner as the burial and interment fees.

At the Sessions, counsel for the appellants contended that the said lands and premises were exempt from rating as being a cemetery, and further that the said lands and premises were used for charitable purposes within the meaning of the Tenement Valuation Acts, and that the Commissioner of Valuation, in making out the lists or tables of valuation, should have distinguished the said lands and premises as being used for such purposes. Counsel for the respondent contended that the fact of said lands and premises being a cemetery afforded no ground of exemption from rating, and further contended that the said lands and premises were not used exclusively for charitable purposes.

The learned Recorder held that the appeal should be dismissed, but without costs, and at the appellants' request stated this Case—the questions submitted to the Court being, "Whether under the foregoing state of facts the said lands and premises mentioned in the list prepared by the Commissioner of Valuation, or any of

them, are, or is, exempt from rating as being a cemetery?" and, "Whether, the said lands and premises are, or are not, lands and premises used exclusively for charitable purposes within the meaning of the several Acts relating to the valuation of rateable property in Ireland, and as such exempt from rating?"

D. F. Browne (*Piers White*, *Q.C.*, with him), for the appellants, argued that section 63 of the Irish Poor Law Act, 1838, 1 & 2 Vict. c. 56, was unaffected by the provisions of the subsequent Valuation Acts of 1852 and 1854, and that the exemption in that section of "any burial ground or cemetery" was absolute and unqualified;—and that, even if qualified by the words, "except where any private profit or use shall be directly derived therefrom," in the same section, still the Glasnevin Cemetery would be exempt, as the facts of the case showed that no such profit or use was derived from the income by the Committee, all receipts being expended in the maintenance of the undertaking under the provisions of the Act of 1846, or applied directly in charity, or funded for the very objects authorized by the Act.

Vesey FitzGerald, and *Houston*, *Q.C.*, for the Commissioner of Valuation, argued that sect. 63 of the Poor Law Act of 1838 was superseded and impliedly repealed by sect. 2 of the Valuation Act of 1854, and that, in any event, only those cemeteries from which no private profit or use was derived—that is, where there was no "beneficial occupation"—would be exempted from rating under section 63; but that here there was a beneficial occupation, and the Committee were liable; that the purposes of the undertaking were not directly or exclusively charitable, the Committee being bound by no trust, the Act of 1846 omitting to impose even any such trust as was contained in the deed of 1830, and their power to dispose of surplus funds being absolutely discretionary. They contended that the bye-laws in question (Nos. 37 and 38) were *ultra vires*, and could not bind the Committee who made them or their successors; and urged that as a fact only a portion of the annual surplus was applied in charity, and that a claim to exemption could not be maintained on behalf of an undertaking not in itself exclusively charitable,

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on the ground of merely voluntary expenditure on charitable purposes of part or even all of the income of such undertaking. The occupation of the Committee was beneficial within the decision of the House of Lords in the *Mersey Docks Trustees* v. *Cameron* (1).

Piers White, *Q. C.*, in reply, contended that the cemetery was exempt as being used exclusively for charitable purposes, the Committee having no beneficial occupation and being trustees of all surplus for charitable purposes; that this trust was impressed on all funds in their hands by the combined effect of the deed of 1830, the Act of 1846, and the bye-laws made under the powers of that Act, and that these bye-laws were valid and binding upon the Committee and carried out the original object of the undertaking which Parliament had never intended to alter, and had not altered. He contended that the English decisions founded on the Statute of Elizabeth, such as *The Mersey Docks Trustees* v. *Cameron* (1), were inapplicable to Ireland, where the right to exemption depended on the enactments in 1 & 2 Vict. c. 56, s. 63, 15 & 16 Vict. c. 63, s. 16, and 17 & 18 Vict. c. 8, s. 2; and relied on *Guardians of the Londonderry Union* v. *Londonderry Bridge Commissioners* (2), in the Exchequer Chamber, and *Reg.* v. *Mitchelstown Union* (3).

[The following authorities were also cited and discussed during the argument:—*Trustees of the Magee College* v. *Commissioners of Valuation* (4), and the cases there collected; *The Representative Church Body* v. *Same* (5); *Reg.* v. *Sterry* (6); *Reg.* v. *Baptist Missionary Society* (7); *Mayor of Limerick* v. *Commissioner of Valuation* (8); *Reg.* v. *Trustees of Darlington School* (9); *Rex* v. *St. Giles* (10); *St. Thomas' Hospital* v. *Stratton* (11); *Reg.* v. *Badcock* (12); *Reg.* v. *Abney Park Cemetery Co.* (13); *Justices of Lancashire* v. *Overseers of Chetham* (14); *Reg.* v. *Agar* (15);

(1) 11 H. L. Cas. 443.
(2) Ir. R. 2 C. L. 577.
(3) 4 Ir. C. L. R. 590.
(4) Ir. R. 4 C. L. 438.
(5) Ir. R. 6 C. L. 561.
(6) 12 A. & E. 84.
(7) 10 Q. B. 884.
(8) Ir. R. 6 C. L. 420.
(9) 6 Q. B. 682.
(10) 3 B. & Ad. 573.
(11) L. R. 7 H. L. 477.
(12) 6 Q. B. 787.
(13) L. R. 8 Q. B. 515.
(14) L. R. 3 Q. B. 14.
(15) 14 East, 256.

Barton v. *Commissioner of Valuation* (1); *London County Council* v. *Overseers of Erith* (2); Dixon's Carleton's County Courts (Ed. 1891), pp. 567, 568.]

Cur. adv. vult.

HOLMES, J.:—

This case is stated pursuant to the provisions of the 10th section of 23 Vict. c. 4, on the requisition of the Dublin Cemeteries Committee, by the Recorder of Dublin, who has held that their appeal against the revised lists of the Commissioner of Valuation cannot be sustained.

The question involved is set forth in the Case, and was presented in argument, without strict regard to legal accuracy; and this circumstance has led to a discussion of some topics which seem to me to be but remotely connected with the point which the Court is called on to decide. It is not the duty of the Commissioner of Valuation to determine whether hereditaments which, under the 12th section of the Valuation Act of 1852, are to be deemed to be rateable are exempt from rating upon special grounds. He is bound to include all the aforesaid hereditaments in his lists, distinguishing such of them as are of a public nature or used for charitable purposes or for the purpose of science, literature, and the fine arts. By the second section of the Act of 1854, the hereditaments so distinguished, as long as their nature or use shall continue unchanged, are exempted from poor rates and county rates; but, in preparing the valuation lists the liability to rates of the premises included therein does not arise directly at all, and those lists when finally settled are not conclusive as to the rateability of such premises. For example, there may be hereditaments that are not and could not be distinguished in the manner specified, which are exempted from poor rates, or county rates, or both, by the legislation dealing with these assessments; and there are many imposts for the purpose of which the valuation lists are used, the incidence of which depends upon the statutes by which they are created. Under these circumstances I am bound to construe the language of the Case so as to bring it into harmony with the Valuation

(1) Since reported—[1896] 2 Ir. R. 538. (2) [1893] A. C. 562.

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Code, and I can only do so by assuming that the real subject of controversy is whether the lands provided by the appellants for the purposes of their undertaking ought to be distinguished by the Commissioner of Valuation as being of a public nature or used for charitable purposes, either by reason of their being a cemetery or for any other cause.

No one, I presume, will deny that there are or may be cemeteries that would be properly placed in one or other of these classes. The parish churchyard, part of the rector's freehold, to which before legal memory our law attached a right of interment in favour of all who died within the parish, is fitly described as a hereditament of a public nature. So too in modern times when sanitary science has been obliged in populous districts to close the portals of God's Acre, Charity may have no fitter object than that of providing a place of decent burial for the poor. But the use of ground as a cemetery is not in itself charitable nor is it impressed thereby with a public character. Just as men trading individually or in partnership make it their business to supply coffins for the dead, or hearses, biers, and trappings of woe for the funeral, they may in like manner undertake the office of providing graves. The creation of Companies for this purpose has been usual for a long time, and almost fifty years ago one of the statutes passed to prune the redundance of private legislation was The Cemeteries Clauses Act, 1847.

The Dublin Cemeteries Committee obtained Parliamentary sanction in the preceding year; but it had been in active operation for a considerable period before. It originated about the time of the dissolution of the Catholic Association; and from that body there seem to have been obtained the funds by which the lands first acquired were purchased and converted into a place of burial. It is quite clear from the indenture of the 29th March, 1830, which declares the trusts of the undertaking, that it was not intended to be a source of pecuniary benefit to those who promoted it. Their primary motive was probably to have a cemetery managed by Roman Catholics in whom their co-religionists had confidence, and to be used for the interment of persons of that creed. Another object was to realise a profit to be applied to what I assume was a charitable purpose, unless and until some

other purpose not necessarily charitable was substituted for it in the manner provided by the deed. It is unnecessary to dwell at length upon these early trusts, inasmuch as they have been superseded by the provisions of the Local and Personal Act of 1846, which conferred perpetual succession on the Committee, and prescribed the duties and powers of the corporate body thus created. Most of these provisions are such as one might expect to find, and as are, I presume, usually found in a statute of this kind, and show clearly that the cemetery was to be carried on as a business undertaking with the view of earning a profit. There is not the smallest trace of a charitable intention towards the persons who were expected to acquire the right of burial. On the contrary, every right of this kind, whether it be that of constructing a vault or mausoleum in which the rich man's body was to lie undisturbed in perpetuity, or that of interring the poor man's corpse in what is called "the open ground," is to be paid for. The accounts that have been given in evidence show that the enterprise has been carried on successfully. The fees of the sub-committees, the salaries of officers and the wages of servants, the costs of management generally, have been defrayed on a liberal scale; large sums have been devoted to the acquisition of additional lands, or otherwise invested, and each year a considerable surplus has been applied to the maintenance of purely charitable institutions. I asked Mr. White more than once during his argument whether he contended that the lands that formed the cemetery were used for charitable purposes, and I was not surprised, in the case of counsel of his candour and learning, to receive the reply that he did not. It seems to me that the whole case is involved in this question.

There is a plain distinction between lands and buildings which are used for a charitable purpose, and lands and buildings which form part of the plant of a commercial or industrial undertaking, the profits of which, if there be profits, are applied in charity. Hereditaments of the former class are, in both England and Ireland, as a rule, exempt from rating, provided the use is exclusively charitable; but I can find no warrant in legislation or decision for exemption of the latter. Has it ever been suggested that if the owner of a brewery were to vest the undertaking

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in himself and others, upon trust to carry on the business, and upon further trust, after paying all expenses, including salaries or fees for management to himself and his co-trustees, to hand over any profit that would remain to a specified charitable institution, the lands and buildings in which the trade is carried on would be thereby relieved from rates? No such case is to be found, probably because there are limits to even forensic hardihood; but our reports abound in decisions disallowing claims of exemption based upon infinitely stronger grounds.

A Quaker school—founded by donations and subscriptions, and subsequently for the most part maintained thereby, devoted to the maintenance and education of poor children, afforded to them in a great proportion gratuitously; the trustees, managing committee, and subscribers, receiving no pecuniary benefit; the buildings occupied by the scholars, and the land cultivated by them, the produce being devoted to their own use—was held rateable, on the grounds that there was paid for each child a sum which was admittedly inadequate for its support, and which, in most instances, was contributed by private charity: *The Queen* v. *Sterry* (1). A lunatic asylum, established for the gratuitous reception of pauper lunatics, was held liable to rates, because it appeared that, for the purpose of increasing the funds of the institution, a limited number of affluent patients were admitted at various rates of payment, though the profits derived from their reception were applied for the support of the paupers: *Rex* v. *Inhabitants of St. Giles* (2). The buildings used by the Baptist Missionary Society for the management and direction of their noble work of heathen evangelization, supported entirely by voluntary contributions, were held rateable on the grounds that they occasionally allowed some of their apartments to be used by other similar societies upon the terms of the latter contributing a part of the expense of the lighting, warming, and cleansing of the premises: *Reg.* v. *Baptist Missionary Society* (3).

I content myself with mentioning these early authorities. The current of decision has flowed without interruption in the same channel down to the present time; but it would be an

(1) 12 A. & E. 84. (2) 3 B. & Ad. 573. (3) 10 Q. B. 884.

unnecessary and almost endless labour to examine all the cases. One clear principle can be gathered from them—namely, that when lands and buildings, belonging to a charitable foundation, are so used as to bring in profit or income, they cannot be said to be used exclusively for charitable purposes, notwithstanding that such profit or income is added to the funds of the charity. Under these circumstances, it seems to me that Mr. White's elaborate attempt to show that the surplus funds in the hands of the appellants are impressed with a charitable trust, was irrelevant. In the cases I have referred to, and in many others which I might refer to, the money realized by the use of the hereditaments was not only devoted to the objects of the charity, but could not have been devoted to any other purpose without a breach of trust. The income derived from Glasnevin Cemetery certainly stands in no better position. In my opinion it is in a worse one, because I believe Mr. White's proposition cannot be sustained. The 20th section of the Act provides that the surplus of the moneys arising from the sale of burial rights that shall remain after the payment of expenses shall be applied in such manner as to the majority of the governing body shall seem fit. Under what has been called a bye-law, but what in reality is merely an expression of intention on the part of the Committee, operative only so long as they choose to act on it, an indefinite portion of the surplus is distributed amongst several charitable institutions, the rest being reserved for the acquisition of lands for the purposes of the undertaking. There is nothing that obliges the Committee to continue these charitable contributions.. The Legislature has given the governing body unlimited discretion. It would, no doubt, be dishonourable, but, I think, not illegal, if the members of that body were to use the surplus for their personal advantage; but many modes of employing it could be suggested which, although not charitable, would be neither dishonourable nor illegal. In fact, I see no distinction in principle between the position of the Cemeteries Committee and that of a partnership carrying on a commercial or mercantile business and agreeing to devote a considerable portion of their profits to charitable objects. For these reasons I am of opinion that the appeal was rightly decided by the Recorder.

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It will be observed that I have arrived at a decision without reference to the 63rd section of 1 & 2 Vict. c. 56, so much dwelt on by counsel for the appellants. This is one of the topics which I think is only very remotely connected with the question before the Court. Whether the provisions of that section have been repealed or replaced by the Valuation Code, may or may not be of importance in litigation like the *Derry Bridge Case* (1), where the guardians of a union sue for poor rates; but it is not the enactment which prescribes the duty of the Commissioner of Valuation in preparing his lists. Even if it conferred an absolute exemption from poor rates upon all cemeteries, the Commissioner would still be bound to act under the 2nd section of the Act of 1854, and confine his consideration to whether the hereditaments are of a public nature or used for the charitable or other purposes therein mentioned. It is, however, noteworthy that counsel for the appellants did not claim for cemeteries an absolute exemption from poor rates. To do so would have been too startling. In the year 1840, their liability to such rates, as well as the principle upon which the valuation was to be made, was established in England in *The Queen* v. *St. Mary Abbots* (2), and this case has been since uniformly acted on, and was confirmed in *The Queen* v. *The Abney Park Cemetery Co.* (3). In Ireland, cemeteries carried on as a business are rated. Mount Jerome, for example, in this city pays rates; and, if I did not misunderstand counsel, Glasnevin itself would seem to have been also rated at one time.

The second branch of Mr. White's argument was identical with the first. He did not claim exemption because the lands were used as a cemetery, but because the profits were devoted to charity. It seems to me (and I have heard no argument to the contrary) that whether the 63rd section of the Poor Law Act is repealed or not, the exemptions therein contained are no wider than what is specified more succinctly in the 2nd section of the Valuation Act of 1854. The latter provision, if it has not replaced, may be used to explain and construe the former. I do not desire, however, in my decision to go beyond the necessities of

(1) Ir. R. 1 C. L. 283. (2) 12 A. & E. 824. (3) L. R. 8 Q. B. 515.

the case before us, and I reserve my last word on this point for an occasion to which it will be more pertinent than it would be at present.

JOHNSON, J.:—

The appellants are a body constituted by Act of Parliament. The hereditaments and tenements in question, of which they are occupiers, consist of the burial ground, usually known as the Glasnevin Cemetery, cottages of labourers employed in the cemetery, the holding consisting of house, offices, and land called Clareville (the residence of the superintendent of the cemetery), and land from time to time acquired for, but not yet absorbed into, the cemetery and meantime let at grazing rents. In making out the Valuation List for the Parish and Electoral Division of Glasnevin, the Commissioner of Valuation did not, under the Valuation Act of 1854 (17 Vict. c. 8), sect. 2, distinguish these hereditaments and tenements, so that they should be deemed exempt from assessment for rating. The appellants appealed under the Valuation Act of 1852 (15 & 16 Vict. c. 63, sect. 22) to Quarter Sessions, and being unsuccessful they required the Chairman (the Recorder of Dublin) to state this Case (23 & 24 Vict. c. 4, sect. 10), which raises the substantial matter whether the Commissioner of Valuation was right in not so distinguishing these hereditaments and tenements in the Valuation List; and this the learned Recorder has formulated in two questions submitted by the Case to this Court. The appellants contend that these hereditaments and tenements ought to be so distinguished, because burial grounds and cemeteries are expressly exempt under the Poor Law Act of 1838 (1 & 2 Vict. c. 56, sect. 63), except so far as any private profit or use is directly derived therefrom. When the Poor Law Act was passed the Tenement Valuation Act in force was the 6 & 7 Wm. 4, c. 84 (1836); the valuation under that Act was not then completed through Ireland, or was not considered by Parliament appropriate for the poor law system. The Poor Law Act was therefore made complete in itself for poor law purposes, both for rating and valuation. By sect. 61 poor rate is payable by the occupier of every rateable hereditament in the Union. By sect. 63 rateable hereditaments under the Poor

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Law Act are defined, with the proviso, "that no church, chapel, or other building exclusively dedicated to religious worship, or exclusively used for the education of the poor; nor any burial-ground or cemetery, nor any infirmary, hospital, charity school, or other building used exclusively for charitable purposes, nor any building, land, or hereditament dedicated to or used for public purposes, shall be rateable, except where any private profit or use shall be directly derived therefrom, in which case the person deriving such profit or use shall be liable to be rated according to the annual value of such profit or use." By sect. 64 poor rate is a poundage rate on the estimated net annual value of the hereditaments rated to the poor rate, to be ascertained as prescribed by that section; and sect. 66 authorised the guardians of any Union to adopt existing surveys and valuations if sufficient, and, if not, to make surveys and valuations. But, in 1846, the Legislature, by 9 & 10 Vict. c. 110, put an end to valuations by Poor Law guardians, and by sect. 9 required the Commissioner of Valuation to cause every rateable hereditament under the Poor Law Act to be valued on the estimated net annual value, as in sect. 64 of the Poor Law Act; by sect. 27 directed that the valuation should be transmited to the guardians; and by sect. 28 enacted that the poor rate should be made on the persons liable to pay poor rate according to such valuation and upon no other. Then came the Valuation Act of 1852 (15 & 16 Vict. c. 63) reciting "it is expedient to make one uniform valuation of lands and tenements in Ireland, which may be used for all public and local assessments and other rating, and for this purpose it is necessary to amend the laws in force for the valuation of lands and tenements in Ireland." The first nine sections of this Act were repealed by the Statute Law Revision Act of 1875 (38 & 39 Vict. c. 66); sect. 10 provides for revision of valuation; sect. 11 settles the basis of valuation of rateable lands and buildings respectively; sect. 12 defines what "for the purposes of this Act shall be deemed to be rateable hereditaments," and (with the addition of the provision in the case of land or buildings used exclusively for public, scientific, or charitable purposes as thereinafter specified) adopts verbatim the Poor Law Act, sect. 63, except the proviso for exemption, which I have mentioned, which it entirely omits.

The Valuation Act of 1854 (17 Vict. c. 8), section 1, repeals section 15 of the Valuation Act of 1852, and substitutes for it section 2 of the Valuation Act of 1854, which, with section 16 of the Act of 1852, enacts what hereditaments are to be distinguished by the Commissioner of Valuation in the Valuation Lists as exempt from assessment; and it is upon the duty of the Commissioner of Valuation, as prescribed by these two Valuation Acts of 1852 and 1854, and not upon any exemption from poor rate in the Poor Law Act, that the determination of the questions in the present case depends. I therefore think that this contention of the appellants fails.

It was not contended, nor could it be successfully contended, that the hereditaments and tenements in question were of a public nature; but it was strenuously contended for the appellants that they are used exclusively for charitable purposes. The Valuation Act of 1854, section 2, enacts that the Commissioner of Valuation shall, in making out the Valuation Lists, "distinguish all hereditaments and tenements, or portions of the same, of a public nature, or used for charitable purposes, or for the purposes of science," &c.; and it then enacts what shall be the consequence in law of their being so distinguished, viz.: "All such hereditaments or tenements, or portions of the same, so distinguished, shall so long as they shall continue to be of a public nature and occupied for the public service, or used for the purposes aforesaid, be deemed exempt from all assessment for" poor rate and county cess. Section 16 of the Act of 1852 enacts that, "for the purposes of such valuation, no hereditaments or tenements, or portions of the same, shall be deemed to be of a public nature, or used for such charitable, scientific, or other purposes as hereinbefore specified" (*i.e.* as hereinbefore by this Act as amended by the Act of 1854, 17 Vict. c. 8, s. 2, is specified), "within the meaning of this Act" (that is, as amended by the Act of 1854), "unless such hereditaments or tenements, or portions of the same respectively, shall be altogether of a public nature, or used exclusively for such charitable, scientific or other purposes aforesaid."

The duty of the Commissioner of Valuation, therefore, is prescribed by the Acts of 1852 and 1854. The rateable hereditaments which he is to value are specified by the Act of 1852, section

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12, in terms sufficiently comprehensive to include the hereditaments and tenements in question. The only exemptions are to be found under the Act of 1854, section 26, and the Act of 1852, section 16, in one or other of two classes, viz.: Such hereditaments and tenements as are (1) altogether of a public nature, or (2) used exclusively for charitable purposes, or for the purpose of science, literature, and the fine arts, specified in the 6 & 7 Vict. c. 36. These two classes furnish the tests by which the Commissioner is to be guided in ascertaining what hereditaments are to be so distinguished in the Valuation Lists. The hereditaments in question are not within the first class, and do not answer the test furnished by that class. The public have no rights of any kind in this cemetery. It is the property of the appellants, in their occupation, and under their exclusive control. By their statutable rights it is available only for the burial place of those by or on whose behalf the privilege of burying there is bought from the appellants, and no member of the public, as such, has any right there of burial or otherwise. But it is strenuously argued for the appellants that these hereditaments and tenements are used exclusively for charitable purposes and fall within the second class of exemptions, and answer the test furnished by that class, being, as put by Mr. White in his very able argument, a settled charitable endowment created by the collective operation of the trust deed of 29th March, 1830, the Act of 9 & 10 Vict. c. ccclxi. and the bye-laws made or purporting to be made under that Act, Nos. 37 and 38.

In 1828 ground at Golden Bridge was conveyed to grantees, who were afterwards parties to the indenture of 29th March, 1830, which recites (as appeared by the copy produced on the argument), a little more fully than is set out in the Case, that the ground at Golden Bridge had been purchased, for the purpose of being converted into a place for burial, by funds collected by persons who theretofore formed the body or society called The New Catholic Association of Ireland, and entrusted to the parties of the second part (the grantees in the conveyance of the Golden Bridge ground), as a committee for the regulation and management of the same, with the leading object of obtaining said burial ground to procure for Catholics that which was enjoyed

by persons of all other denominations, the right of being buried with the rites of their own church. It also recites that the ground had actually been converted into a burial ground, and that various sums of money had been, and were likely from time to time thereafter to be, received for the privilege and right of burial therein, and that by the constitution of said committee the net proceeds of said burial ground should be applied, under the sanction of the Catholic Archbishop of Dublin and his successors, to the promotion and support of a model school, or schools in the nature of a model school or schools, *or* for the purpose of increasing burial grounds, subject to the discretion thereinafter mentioned. The trusts declared by this indenture were that the premises should be held in perpetuity as a burial ground, and that all rents, fees, and emoluments arising out of the burial ground and right of sepulture and erecting tombs or monuments, should, after payment of expenses, be applicable, under the sanction of the Archbishop and his successors, to the present or other model school or schools *or* for the purchase and acquisition of other burial grounds, as thereinafter mentioned. Provision was made for payment by the treasurers of their net balances over outgoings to the Archbishop, to be applied by him to the completion and support of the model school in Richmond-street, "so long as the said Archbishop or his successors should think fit," and that, if it appeared to the Archbishop that "any other application" of the surplus income ought to be made, it should be determined by the majority, at a meeting of the parties to this indenture, with the Archbishop's sanction; and that, if they could not agree, the surplus income was to be accumulated until they could agree on the application.

The main object of these trusts was the maintenance of Catholic burial grounds, and as surplus income was anticipated, the discretionary application of surplus income to a school or schools, until it appeared to the Archbishop, in the exercise of his discretion, that "any other application" should be made of it; and such other application of it was then to be determined by the majority of the parties to this indenture (the governing body) with the sanction of the Archbishop; and, if they differed, the surplus income was to be accumulated until they agreed on its

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application. In the result an annual net profit was made by the cemetery, and, so far as this indenture is concerned, its application to the indicated school or schools was discretionary with the Archbishop. Subsequently other lands were acquired on trusts, similar to the trusts of the indenture of March, 1830, and converted into the hereditaments and tenements in question.

In the course of a few years it was found that an Act of Parliament was necessary for the effectual working of the cemeteries, and accordingly, in 1846, the Act 9 & 10 Vict. c. ccclxi., a Local and Personal Act, to be deemed and judicially noticed as a Public Act, was passed, reciting the establishment of the cemeteries of Golden Bridge and Glasnevin, and that "it is expedient to provide for the maintenance, improvement, and extension of said cemeteries, and to preserve the bodies interred in them from disturbance and desecration," and, after enumerating the individuals who then were "the present trustees and committee or body constituted for the government of burial grounds," the Act constituted these persons by name, and all who should be nominated or selected to fill their vacancies, and their successors, "a committee or governing body for the maintenance of said cemeteries and for the purchase of land for other cemeteries, by this Act authorised to be maintained, according to the provisions and restrictions hereinafter mentioned, by the name and style of the Dublin Cemeteries Committee," with power to hold lands. This preamble defines the objects and scope of the Act. Accordingly, sections 2 to 5 deal with election of members of the Committee and their proceedings. Sect. 6 authorises the making of bye-laws by the Committee for specified and limited purposes, and also authorises the appointment and payment of attending members of sub-committee. Sections 7 to 13 deal with legal proceedings; sect. 14 provides that the governing body (the Committee) "shall, by and out of the moneys to be received by virtue of this Act, keep all and singular the burial grounds and cemeteries, chapel or chapels, and the several buildings thereon and therein, and the external walls and fences thereof, and all other parts of the same which by this Act they are authorised to erect and maintain, in thorough and complete repair." Sect. 18 authorises the sale of rights of burial, construction of vaults, and erection of monuments. Sect.

20 enacts that all moneys arising by the sales of burial places, vaults, and monuments, shall be applied, "in the first place, in paying head-rents, fees, salaries, stipends, and other charges and expenses which by virtue of this Act shall from time to time be due and payable, or otherwise incurred in carrying same into execution, and the surplus of such moneys (if any) shall from time to time be applied in such manner as to the majority of the governing body shall seem fit." The payment of stipends to chaplains is also provided for. Thus the Act, by sect. 18, legalises the sale of rights of burial, &c., and enacts that the proceeds are to be applied (sections 14, 20) in keeping up the cemeteries and payment of outgoings, and devotes the surplus income (if any) to be from time to time applied as to the majority of the governing body shall seem fit. No school or charitable object is named or suggested; no sanction or discretion is reserved to or vested in the Archbishop. The disposal of surplus income, therefore, is governed by this Act, which supersedes the discretionary provision respecting the surplus in the indenture of 1830.

The Golden Bridge Cemetery is out of the case; it is closed and not rated.

Then the bye-laws of the 6th September, 1876, Nos. 37 and 38, are relied on for the appellants. The statutable authority to the governing body to make bye-laws, under sect. 6, is "for the better order of their proceedings," and "the management and maintenance of the burial grounds." These bye-laws profess to be within this authority, but the majority of the governing body, for the time being, cannot bind their successors in the execution of their duty as to the application of the surplus, or limit their discretion in the matter, or override or control the express provision of the Act of Parliament, which enacts that the surplus shall from time to time be applied in such manner as to "the majority of the governing body shall seem fit."

I am therefore unable to agree with Mr. White's argument. The object for which the appellants exist as a body and hold the hereditaments and tenements in question is the maintenance and extension of the cemetery. For this they are legally authorised to sell for profit the privilege of burial, of the construction of vaults, and of erecting monuments. Thus they derive a revenue largely

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exceeding outgoings. Part of this profit has been invested in land ultimately to be burial-ground, but now producing income as rent; part of this profit has been accumulated, and at present bears interest, which is income, and may be hereafter applied in redeeming rent, which by diminishing outgoings will increase revenue; and part of this profit, in the exercise of statutory discretion as to its application from time to time, has been periodically handed to certain schools from which it may at any time be in all or part withheld, and be otherwise applied. This is not, in my opinion, what the Valuation Acts mean by "used exclusively for charitable purposes"; and I therefore think that this contention of the appellants also fails.

An argument was pressed on the Court that valuation is for rating purposes, that a rate is a tax, and that the Valuation Acts are in effect taxing Acts, and ought to be strictly construed; but it is not to be forgotten that when a given sum to be raised by rate off a limited area, every exemption within that area from the rate increases the burden on the other ratepayers, and also indirectly compels them to subscribe to the exempted institution with which they may have no concern. In my opinion the rule of construction applicable to the Valuation Acts is to read them in the ordinary acceptation, according to the English language, of the words in which they are expressed, and in which presumably the Legislature intended them to be read; and so construing them I am of opinion that the Commissioner of Valuation was right in not distinguishing these hereditaments and tenements in the Valuation List, and that the decision of the Quarter Session was correct.

Although for the purposes of this case the decision of this Court is, in the words of the statute (23 & 24 Vict. c. 4, s. 10), "final and conclusive on all parties," yet, according to the course adopted in *The Londonderry Bridge Case* (1), it may still be open to the appellants to question their liability to poor rate.

(1) Ir. R. 1 C. L. 283: see judgment of O'Brien, J., at p. 290; Ir. R. 2 C. L. 577.

O'BRIEN, J. :—

The question in this case—without regard to the point not quite perhaps easy of solution, as to the scope and effect of an appeal under the Valuation Acts—is whether the Glasnevin Cemetery is liable to be rated. For fifty years, I suppose, at least, it has not been considered to be so, though it is obvious the matter must have received attention from time to time; and this is a matter that of course not only suggests great circumspection as to the grounds of making a change in that respect, but also comes very near a matter of legal right; for though there is no rule of limitation which can be applied to exemption from public assessment, yet there is a principle of law which cannot be deprived of its influence on the subject, and that is, that taxation cannot be imposed except in clear and certain terms, and exemption that has continued so long in substance is not different from property. There is another consequence, in the immediate instance, of such gravity that it may well cause any tribunal to hesitate before making such a change. The whole of the revenue of these Catholic cemeteries, after the payment of the expenses, and the provision made for their maintenance and continuance, goes to Catholic charities. Not less than £870 is distributed yearly among so many as forty Catholic schools, forming a substantial means for the support of very poor institutions, without the aid of which they must be severely crippled, and this fund which will be the first to be touched by taxation, it is now proposed to the extent of the assessment to take away; and certainly it gives a severe shock to all ordinary ideas people entertain as to the security of the possession they may have enjoyed for no matter how long a time, that it should be in the power of the Executive for the time being—according to the varying views that may exist of social economy, or the degrees of lynx-eyed vigilance on the part of officials—all at once to effect so great a disturbance in the conditions of existence of a wide class of institutions—and these belonging to the weakest part of the community—which have hitherto depended upon a particular means of maintenance.

Chief Justice Whiteside, in his judgment in *The Magee College Case* (1), wanted to know what relation that institution

(1) Ir. R. 4 C. L. 438.

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had to the interests of the poor, which he considered to be the foundation of the exemption of charities from taxation. He would at all events have no such difficulty, in his somewhat rhetorical views of law, as to forty schools for the children of poor Catholic parents in this city. That case, which was decided nearly thirty years ago without being followed by any such application of it, has been discovered suddenly to be the authority for holding that the Glasnevin Cemetery is not exclusively a charitable institution. But it seems to me that nothing was ever more groundless than the argument that the principle of the two cases is the same. Leave out of consideration, as not affecting the quality of charity, the character of Magee College—that it was founded exclusively for persons of a particular denomination, though that is treated in the judgments as an element in the case—take it also that a class of professors, as highly paid as the fellows of a university, are a necessary part of the machinery of the charity—that they are not different in that respect from the grave-diggers of the cemetery—but what do we say to the fees received from the students? or to the bursaries that were intended to be founded? or to the admission of students from outside the college to the courses of instruction on paying certain sums for them? There is no analogy to these sources of revenue or benefits in the fees received for burials. In the former case the emolument is external to the direct object of the supposed charity. In the case of a cemetery the emolument comes from the direct execution of the charitable object; and it was upon this single ground, which was so largely quoted for the argument, though not for the decision, that the judgment was expressly based. "In my opinion," he says, "the payment of fees by the students brings it within the principles on which these several cases" (referred to by him) "were decided." He did not put his decision on the ground which was urged in the argument that that which was itself a charitable use of part of the revenue from the charitable institution would take away the exemption. I wonder are all the blind asylums or orphanages in Dublin, that make mats and baskets for their support, assessed to rate. If not, we must begin a somewhat extensive raid. Here the charity is in the burials, in the disposal of the dead, with due regard to public safety and to the reverence

which is common to all ages and nations, and the benefits are not at all to those who pay. Even in the *Magee College Case* (1) Mr. Justice Fitz Gerald stated that he entertained doubts whether the case did not come within the terms of the Valuation Acts, as hereditaments used for charitable purposes. And, moreover, the case, so far as it can be alleged to be a decision that income derived from a public undertaking, and applied to the undertaking, is not exclusively used for public objects—the term used in the same sentence in reference to public objects—is directly in conflict with the *Londonderry Bridge Case* (2), which was a decision of the Exchequer Chamber, and therefore of higher authority, and was not merely not distinguished, but was not even mentioned in any of the judgments except that of Mr. Justice George, and by him in terms conveying merely that it was a thing in existence, but without the least idea that he had any information what it decided. Further still, the English decisions, such as the *Mersey Docks Case* (3), and all those which have followed it, which have been persistently brought forward in the present argument as authorities, were expressly admitted, in the judgments in the *Magee College Case* (1), to have no direct application to the Irish Valuation Acts, because they were made upon the Statute of Elizabeth, which contained no exception whatever, and under which therefore all property capable of beneficial occupation, and not in the possession of the Crown, which was not bound as not being named in the statute, was liable to rate.

There is, therefore, so far as I know, absolutely no case applicable to this country, in which property was held not to be exclusively charitable because income was derived from it though applied to the use of the charity. In the *Londonderry Bridge Case* (2) the principle, which was adopted from the *Mersey Docks Case* (3) and others by the Queen's Bench, both in that case and afterwards the *Magee College Case* (1)—that those decisions, while they were not directly applicable, furnished a rule under the Irish Acts for determining what was property altogether public, in the one clause, and used exclusively for a charitable

(1) Ir. R. 4 C. L. 438. (2) I. R. 1 C. L. 283; 2 C. L. 577.
(3) 11 H. L. Cas. 485.

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purpose, in the other—was expressly overruled in the Exchequer Chamber, so that the *Magee College Case* (1) now stands as an authority upon a foundation which was undeniably taken away by the Court of Appeal. "In other words," says, Chief Justice Monahan (2), "we are to hold that the exemption in the Irish Act is to have no effect whatever, and that the Irish Act, which expressly exempts property used for public purposes, is to have the same construction as the English Act, which contains no such exemption." He further says, "I apprehend that an Act imposing a tax or taking away an exemption from a rate or tax, must be clear and express. The Valuation Acts do not seem to me to be at all intended to alter rateability; they rather seem to apply to the valuation of property which is liable to be rated, and that they have nothing to do with what property is to be rated." This last observation is of great importance in reference to the effect of the valuation and the consequence of our decision, and the questions which we are asked to determine.

The Commissioner of Valuation is required to distinguish in the lists property which is of a public nature or used for charitable purposes, and the property so distinguished is declared to be exempt for assessment. The Cemeteries Committee, having for the first time been assessed in the ordinary way, considered they were bound and had a right to appeal on the ground that their property was not so distinguished, and that they had not received the benefit of immediate and absolute exemption on the face of the valuation, to which they would be entitled from the execution by the officer of Valuation of the duty imposed upon him by the statute. The effect of that exemption, when not appealed against, would be to put an end to all question of liability to the rate. But it is entirely another question what effect the rejection of the appeal has on the right of the party charged to dispute his liability in a proceeding taken to recover the rate. The parties would not be the same in that case—which is the usual test whether a judgment is conclusive. In the appeal the statute makes the officer of valuation the respondent, whereas an action for the rate would be between the body entitled to the rate and the party charged.

(1) Ir. R. 4 C. L. 438. (2) Ir. R. 2 C. L. 599.

However it must be borne in mind that by section 22 of 15 & 16 Vict. c. 63, the notice must state the ground of the appeal, and, by section 23, the Court is debarrred from entering into any other cause or matter of appeal but that stated in the notice; and, for that reason, unless the party had appealed, the decision would probably be held, in an action for the rate, to be a judgment, though between different parties, binding on the defendant, in a question on which he has himself expressly invited the decision of the Court. That could not be held, according to my view, to apply to a new rate, which is a new and distinct liability, as to which new grounds either of exemption or charge may come into existence, such as property becoming or ceasing to be public or charitable. It is clear that by the terms of the Act a person may appeal on the question of chargeability as well as the amount of the valuation or any other ground; but, while the statute assigns the effect of exemption, it does not declare the effect of any decision as to chargeability; and I see nothing in the Act, or in the general principles of law, that makes it incumbent on the party to appeal, as distinct from resisting the demand at law, and on that point am constrained to differ from the opinion expressed by Chief Justice Morris in the *Londonderry Bridge Case* (1), which was not the decision of the Court, and, as appears by the report, was expressly abandoned by the guardians as one of the grounds of argument. This point is very material, because it affects the right of appeal from the Superior Court to which the question may be submitted, which was deemed so material in the *Londonderry Case* (1), that, with a view of carrying the case to the highest tribunal, it was considered proper by the Court itself to have an action at law substituted for a Case Stated. And, in view of a question which may arise at a future time as to the effect of the present decision, it occurs to me that the proper and legal course is not to answer the questions stated in the Case, but simply, according to the result, to hold that the Court of Quarter Sessions was right or wrong in their determination. It is the order which the Court of Quarter Sessions makes, the exercise of the authority it has by law, which is the subject of and affected by the judgment

(1) Ir. R. 1 C. L. 283; Ir. R. 2 C. L. 577.

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of the Superior Court, not the principles or reasons by which it arrives at the result, though these are inferentially determined. The Act of Parliament which provides, in valuation appeals, for a case stated to the Superior Court (23 Vict. c. 4, sections 10 and 11), expressly follows in terms the Act relating to the cases stated by magistrates, in which they are to state the facts and grounds of the decision; and what the Court is to do is to reverse, affirm or amend the decision—which cannot be to reverse, affirm, or amend propositions of law. There is no other authority given to the Superior Court; and accordingly, in magistrates' cases under the same terms, the only question ever put, or answered, is whether the magistrates were correct or not in their determination.

Now, with respect to the general question of liability and exemption, and the effect of the Cemeteries Act as determining the character of the institution in question, the case sets out the origin of the trust as existing under two deeds, dated the 22nd December, 1828, and 2nd March, 1830, under which the cemeteries were founded, and any funds arising from the rights of sepulture, after payment of expenses, were dedicated to education and the acquisition of other lands for the same purpose.

It is not controverted that these objects are the same as at present, and the present objection, therefore, if well founded, lay to the original institution. Now, unless it be the law that the fact of funds accruing from the execution of a charitable object, though funds are necessary for expenses, and though the surplus be used for the continuance and maintenance of the charity, has the effect of preventing it from being charitable, there can be no doubt that the original object, to which the statute was applied, was in itself charitable. The burial of the dead is undoubtedly a charity, if revealed religion, law, and the example of mankind, in all times and nations, can make it so. Now, the Cemeteries Act recites that it was expedient to provide for the maintenance, improvement, and extension of the cemeteries, and to preserve the bodies in them from disturbance and desecration, and refers to the present trustees, and to the purchase of lands for other cemeteries, so that it distinctly recognises a trust for an object which is in law charitable; and it could not be supposed that the Legislature intended to authorise what would be a violation of the trust,

whatever it was. Part of the original trust was for the support of a model school, which was also a charity; and if that object was not practicable at the time the Act was passed, and if a power were given by the 20th section to apply the surplus to such objects as the majority should think fit, the words certainly would be capable of the construction that the other objects also were intended to be charitable; and that admits the application of the rule according to which statutes and instruments are open to be interpreted by the use that follows them; and, in this instance, the use is still for education according to the original design.

All this argument, however, is founded upon the idea that a statute necessarily alters the trust or determines its character so that it is no longer charitable, and must go the further length that a power which is ambiguous, and may or may not be used for a charitable object, renders the use not charitable. And in this same idea only can the objection be made, that the bye-law which devotes part of the income to the schools is unauthorised under the Act. But the bye-law is strong evidence of the actual use, and the words of the Valuation Acts are "used for charitable purposes," so that it is the use that determines the character, and here we have a uniform use of exactly half a century since the Cemeteries Act passed. It is impossible therefore, as far as the 20th section is concerned, to take the case out of the express words of the exemption.

On behalf of the Cemeteries Committee, it is contended that the property is exempt because it is a burial ground, and also because it is used exclusively for charitable purposes within the meaning of the law of this country. Section 63 of the Poor Law Act contains the proviso, "that no church, chapel, or other building exclusively dedicated to religious worship, or exclusively used for the education of the poor, nor any burial ground nor cemetery, nor any infirmary, hospital, or charity-school, or other building used exclusively for charitable purposes, nor any building land or hereditament dedicated to or used for public purposes, shall be rateable except where any private profit or use shall be directly derived therefrom—in which case the person deriving such profit or use shall be liable to be rated as an occupier according to

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the annual value of such profit or use." It will be observed that, in this enumeration, the word "exclusively" is attached in each instance to "building," which, of course, a burial ground is not, while the qualification as to private profit or use follows, and applies to the whole preceding category. This section is not repealed; it contains the same enumeration of rateable hereditaments which is found in section 12 of the Act of 1852, with the addition of half the rent of buildings used for public, charitable, or scientific objects, and the exemptions stand, subject only to the qualification in section 15 of the Act of 1852, that no hereditaments or tenements distinguished in the valuation shall be deemed to be a public nature or used for charitable purposes unless they shall be altogether of a public nature or used exclusively for such purposes, and to the further qualification in the Amending Act of 1854 that they shall be exempt only so long as they shall continue to be so used. Are burial places or cemeteries exempt at all from rate? If so, the exemption necessarily rests on section 63 of 1 & 2 Vict. c. 56, carried into the Tenement Valuation Act of 1846 by section 9, and into the Act of 1854 by section 2 of that statute; and in section 63 they most manifestly are distinct from the charitable property specified in that section, and, it may be contended, are absolutely exempt, subject only to the condition of not being used for private gain, and do not come at all within the provision as to exclusive use.

I entertain the strongest possible doubt whether, in the clause that says the property shall be exclusively used for charitable purposes, or so long as it shall be so used, the Legislature thought at all of the specific subjects that are excepted in the Acts, which are not things composite in their nature, or liable to ambiguity or change. A school is a place to which persons go for learning; a hospital is a place for the sick; a church is a place where people pray; a cemetery is a place where people do not go of their own accord, and where they remain. These are visible, external, and single things, in which there is no partnership of objects, and no change. If they change they would cease to be what they are. It is not the use that would change, but the specific thing. And the public interest is answered, in accordance with common sense, and the provisions of the statute, by the exception that a private

use or profit alone shall deprive them of exemption. Otherwise, where are we to stop? Is a Catholic Church not exempt because money is collected at the doors? or a hospital because some patients pay? I therefore am disposed strongly to think that this point of exclusive use has no application at all to such a subject as a burial-place. But suppose the term hereditaments was intended to comprehend all the subjects of exemption in the first Act, we have to consider the question whether the institution in this case comes within the condition that it shall be used exclusively for charitable purposes. Now the learned Recorder, whose opinion expressed on another occasion has, I should say, invited this departure in the valuation, has based himself in his judgment on the supposed authority of the case of the Writers to the Signet in Scotland quoted by Lord Watson in 15th Appeal Cases. That case, however, has nothing to say to the present question. The Writers to the Signet, like the Incorporated Society, were held to be a body engaged in promoting the interests of a particular profession, and not exempt from taxation. But the main argument is that it would be open to a person to establish any kind of business, such as a brewery, and devote the funds to charity, and, on that ground, to claim exemption from rates. The argument, to my mind, is an entire fallacy, and fails in the essential condition on which exemption is founded. The object of the occupation in that case would not be charitable. A burial-place is not a brewery. In the one case the direct and primary object is charitable, in the other it is not. The test is assumed to be, Is the purpose exclusively charitable? How can it make it less exclusively charitable that there are two objects, both charitable, instead of one? The expenses of the cemetery must be provided for. Must we draw the line at the grave-digger? Or can it become charitable by reducing the fees for burial to what will meet the expenses without any excess, in other words, can there be a sliding-scale of exemption? I look in vain for the authority, in the law of this country, that makes income, derived from a charity that requires means for its maintenance, and the surplus of which is applied to another charity, deprive it of exemption. Most certainly the *Magee College Case* (1) does not

(1) Ir. R. 4 C. L. 438.

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decide that. Indeed, I would rather understand that case to be repudiated as having such an effect. The English cases were expressly held, by the Judges who decided the *Londonderry Bridge Case* (1), to have no application to the law of this country. On the other hand, the *Londonderry Bridge Case* (1) itself expressly decides that such income, so applied, does not deprive a public undertaking of exemption; and the words "altogether public" and "exclusively charitable" must have the same extent and meaning. That is a decision by which we are bound; and while that stands, as well as upon reason and principle, there is no warrant, in my opinion, for so extreme a measure, affecting all our ordinary ideas as to the certainty and continuance of rights, as to alter, without positive legislation, what has been regarded as a rule of law, and has governed the working of this institution for the last fifty years.

Solicitor for the appellants: *G. Keogh.*
Solicitor for the respondent: *Sir P. Coll.*

A. E. R. J.

(1) Ir. R. 1 C. L. 283; Ir. R. 2 C. L. 577.

M'SHEFFRY *v.* DOHERTY (1).

Q. B. Div.
1893.
Nov. 28, 30.
Dec. 2.
1894.
Feb. 24.
Appeal.
1895.
Jan. 23, 24, 25.

Landlord and tenant—Ejectment for non-payment of rent—Cross-ejectment—Estoppel—Eviction of portion of leasehold for non-payment of rent issuing out of the entire—Judgment null and void.

W. D. held the lands (known as the T. and E. lands) of C. from the Bishop of Derry for a term of twenty-one years, customarily renewable. In 1872 W. D. purchased from the Church Temporalities Commissioners the perpetuity, which was conveyed to him by indenture, dated the 21st October, 1872, subject to the yearly rent of £119 14*s.* 7*d.* By deed of equal date W. D. mortgaged the lands to the Commissioners, to secure £842 17*s.* 2*d.*, the amount of the purchase-money. The interest in the lands subject to the mortgage became vested in several persons, one denomination called A. and T. being vested in W. D., and the other denominations by virtue of the statute in the several other persons, who, at the time of the grant in perpetuity, were the owners, along with W. D., of the interest in the ecclesiastical lease. In 1840, under a deed of family arrangement, the lands of A. had been made primarily liable to payment of the whole head rent by O. D., the then lessee.

W. D. died in 1876, having by will devised the lands of A. to J. M'S. in trust for Grace D. for life, with remainder to J. D. The perpetuity rent of £119 14*s.* 7*d.* became vested in Edward D., and this having fallen into arrear, he brought, in 1883, an ejectment for non-payment of rent against all the lands comprised in the perpetuity grant. He discontinued this action, and brought a fresh ejectment on foot of the entire rent against the lands of A. alone, serving the writ only on Grace D. and J. M'S. and the under-tenants of A. Grace D. took defence, but subsequently gave a consent for judgment, which was entered on the 15th December, 1883, for the recovery of A., and a habere was executed on the 2nd February, 1884, but Grace D. and the under-tenants were put back as caretakers. Subsequently they refused to give up possession, and an ejectment on the title was brought against them, judgment obtained by default, and a habere executed on the 4th May, 1886, under which Edward D. went into possession of A.

On the 10th February, 1893, J. M'S., Grace D., and J. D. brought an ejectment against Edward D. to recover the lands of A. This resulted in a judgment for the defendant, which the plaintiffs now moved to change, relying on the invalidity of the previous ejectment proceedings as rendering the judgment therein a nullity :—

(1) In the Queen's Bench Division before SIR PETER O'BRIEN, L.C.J., and O'BRIEN and MADDEN, JJ.

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Held, by the Queen's Bench Division, that Grace D. and J. M'S. were estopped from denying the identity of the lands sought to be recovered in that ejectment with those out of which the rent issued; that the plaintiff J. D., in asserting an equitable claim as a volunteer under the settlement of 1840, could not, in the face of that deed, rely on the fact that the rent issued out of other lands, and not out of A. alone; and that accordingly the judgment for the defendant should stand.

Held, by the Court of Appeal, reversing the decision of the Queen's Bench Division (*diss.* Porter, M.R.), that the judgment in the second action of ejectment was null and void, having been recovered in an action brought for the purpose of evicting portion only of the premises comprised in the perpetuity lease, and that it created no estoppel against the present plaintiffs.

William Doherty held the two quarters of land, known as the Termon and Erenagh lands of Clonmany in the Co. of Donegal, under a bishop's lease, from the Bishop of Derry, for twenty-one years customarily renewable. In 1872 William Doherty purchased the perpetuity in the lands from the Church Temporalities Commissioners, which was conveyed to him by indenture, dated the 21st October, 1872, at the rent of £119 14*s.* 7*d.* By deed, of equal date, William Doherty mortgaged the lands to the Church Temporalities Commissioners to secure the sum of £842 17*s.* 2*d.*, the amount of the purchase-money.

The equity of redemption in the lands became vested in several persons; one denomination, called Annagh and Termaine, being vested in William Doherty, and the other denominations, by virtue of the statute, being vested in the several other persons, who, at the time of the grant in perpetuity, were the owners, with William Doherty, of the interest of the other denominations included in the ecclesiastical lease. Under a deed of family arrangement, dated the 19th October, 1840, Annagh had been primarily charged with the rent and expenses of renewing the bishop's lease. William Doherty died in 1876, having previously, by will, devised his portion of the lands to James M'Sheffry and another since deceased, upon trust for Grace Doherty, during her widowhood, with remainder to John Doherty in fee. Grace Doherty thereupon entered into possession of Annagh and Termaine.

The rent reserved by the grant in perpetuity, which issued out of the whole of the said lands of Clonmany, was purchased by Edward Doherty, to whom it was conveyed by indenture, dated

the 23rd December, 1878. This rent fell into arrear, and in January, 1883, Edward Doherty brought an action of ejectment for non-payment of rent for all the lands of Clonmany, but service upon all the tenants in occupation was so difficult that the action was discontinued.

In February, 1883, Edward Doherty brought another ejectment for non-payment of the entire rent, but only against the lands of Annagh and Termaine, which were in the possession of Grace Doherty and her undertenants. She took defence, but afterwards gave a consent for judgment, and judgment was entered for the recovery of Annagh and Termaine; a writ of habere was issued, and possession was taken; but Grace Doherty was put back as caretaker of Termaine, and her undertenants as caretakers of their holdings in Annagh. She subsequently refused to give up possession, and an ejectment on the title was brought against them by Edward Doherty. Judgment was entered and possession recovered.

In 1888 the Irish Land Commission, in whom the interest of the Church Temporalities Commissioners was vested, brought an action in the Chancery Division to recover the sum due on foot of the mortgage of the 21st October, 1872, against the owners of all the lands held under the perpetuity grant (see the case reported, 29 L. R. Ir. 185). It was decided by the Vice-Chancellor that the ejectment for non-payment of rent was inoperative and void, and that the lands, including Annagh, were still subject to the mortgage.

The present action was brought by James M'Sheffry, Grace Doherty, and John Doherty against Edward Doherty, to recover possession of, and establish their title to, the lands of Annagh. The defendant pleaded, besides the plea of possession, the recovery of the judgment by Edward Doherty in 1883 in ejectment for non-payment of rent.

The case was tried before Holmes, J., without a jury, at Londonderry, when his Lordship entered judgment for the defendant. The plaintiffs now moved to change the judgment into a judgment for them.

Meredith, Q. C., and *Wylie*, Q. C., for the plaintiffs.

Ross, Q. C., and *J. A. Rynd*, for the defendant.

Cur. adv. vult.

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Feb. 24.

Madden, J.:—

This is an action for the recovery of the possession of certain lands, and in the alternative for declaration of the plaintiffs' title. Although the question involved is of general importance, it does not appear to have been up to the present time the subject of decision.

The lands to which the action relates were held, with other denominations, of the see of Derry, under the ordinary bishop's lease, renewed from time to time. The last lease was executed in 1871 to one William Doherty. On the 21st of October, 1872, the Commissioners of Church Temporalities executed to William Doherty, under their statutory powers, a perpetuity grant of the lands comprised in this lease, subject to the perpetual yearly rent of £119 14*s.* 7*d.* By a deed of even date the lands comprised in this grant were conveyed to the Commissioners by way of mortgage to secure the purchase-money of the perpetuity of the lands, amounting to the sum of £842 17*s.* 2*d.*

William Doherty, the grantee, was not beneficially entitled to the entire of the lands comprised in the perpetuity grant. He may be considered, for present purposes, as entitled to one of the denominations, namely Annagh, the subject of this action. His position with reference to the other denominations was that of trustee for the persons beneficially interested in the lease, for whose benefit the perpetuity grant enured by virtue of the statutes under which it was executed, and with whose title this action is not concerned. William Doherty, having thus become seized in in fee of Annagh, died in 1876, and the plaintiffs in this action claim these lands under his will—James M'Sheffry as trustee, in whom the legal estate, but for the outstanding mortgage, would be vested; Grace Doherty as tenant for life; and John Doherty as remainderman, with certain equitable rights attaching to the life-estate of Grace.

So far the plaintiffs' title to the lands in question is clear. It is, however, contended that their title has been extinguished by certain ejectment proceedings brought for the recovery of the perpetuity rent reserved by the grant of 1872; and it is necessary to examine those proceedings in detail. The perpetuity rent, reserved by the grant of 1872, became vested in the defendant

Edward Doherty, under a conveyance executed by the Commissioners on the 23rd of December, 1878, and a subsequent devolution of title, the details of which are immaterial. This perpetuity rent possesses certain statutory incidents of a rent-service; amongst others, the right of its owner to bring an action under the ejectment statutes, to recover the land in the event of non-payment. The rent having fallen into arrear, an action of this nature was brought by Edward Doherty, a habere issued, and possession taken. It is with the effect of these proceedings that we are concerned in the present case.

Edward Doherty, in the first instance, included in his action the entire of the lands out of which the perpetuity rent issued, but, for some reason with which we are not concerned, he discontinued this action; and in February, 1883, he instituted a second action, in which he sought to recover the lands of Annagh alone, naming as defendants, Grace Doherty and others, and serving M'Sheffry, the trustee under the will of William Doherty. Grace Doherty took defence, but subsequently signed a consent for judgment. M'Sheffry did not appear. A writ of habere was issued, and possession taken, but Grace Doherty and her undertenants were put back as caretakers. Subsequently Edward Doherty brought an action of ejectment on the title, in which he entered judgment by default, and obtained possession under a writ of habere.

Apart from any question of estoppel, it is quite clear that these ejectment proceedings were wholly inoperative and void. It is unnecessary to examine the authorities which establish that an action of ejectment for non-payment of an entire rent, issuing out of several denominations of land, cannot be maintained against a portion only of the lands (or, as it is generally expressed, that there cannot be a partial eviction for non-payment of rent), inasmuch as the Vice-Chancellor has so decided in regard to these very ejectment proceedings in an action brought by the Land Commission (in whom the interest of the Irish Church Commissioners became vested) against Edward Doherty and others, to recover the sum due on foot of the mortgage of the 21st October, 1872. The Land Commission were complete strangers to the ejectment proceedings, and none of the arguments which have been addressed to us on behalf of the defendant, were available

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as against them. By his judgment, dated the 28th March, 1892, the Vice-Chancellor declared the sum secured by this mortgage to be a good and valid charge on the lands comprised in the perpetuity grant, and in full force and effect, notwithstanding the ejectment proceedings. This he did, upon the ground "that the whole proceeding was unfounded in law and void, and that whatever effect it may have, if any, by way of estoppel upon the parties to it, it cannot affect the title of persons neither parties nor privies, and that they are entitled to maintain an action in the nature of a cross ejectment to recover the possession, or otherwise enforce their rights, which have not been bound by this void proceeding": *Irish Land Commission* v. *Doherty* (1).

The question which we have to decide is that left open by the Vice-Chancellor in the passage which I have quoted, that is to say, the effect, if any, of the proceedings in ejectment upon those who were parties or privies to them.

Now it is, I think, plain that Grace Doherty and M'Sheffry must be treated as parties to these proceedings. The former was named a defendant, took defence, and subsequently gave a consent for judgment. The latter, though not named a defendant, was served with the writ. He had an opportunity of defending, and he appears from the evidence to have known all about the proceedings. Different considerations apply to the case of the plaintiff John Doherty, who was neither named as defendant nor served, and I shall deal with his case separately.

The first question to be considered is whether Grace Doherty and M'Sheffry are estopped from denying that the lands sued for and recovered in the action of ejectment for non-payment of rent are identical with the lands out of which the perpetuity rent issued. As regards the action of ejectment on the title, Grace Doherty had obviously no defence, and the question turns on the proceedings upon which the last-mentioned action was founded.

Several cases have been cited on behalf of the plaintiffs, in which it has been held that a judgment in ejectment does not operate by way of estoppel in the event of a cross ejectment being brought, of which the most important are *Black* v. *Davis* (2); *Coneys* v. *Coneys* (3); and *Kenna* v. *Nugent* (4). It is therefore

(1) 29 L. R. Ir. 185.
(2) Batty, 80.
(3) 8 Ir. C. L. R. 379. [464.
(4) Ir. R. 6 C. L. 547; Ir. R. 7 C. L.

necessary to examine these cases with care, in order to understand the principles upon which they were decided, and to appreciate their application to the question involved in the present action.

The action of ejectment was in its origin a personal action founded on possessory right. Although it had practically superseded the old real actions long before their abolition by statute, it never purported to decide the title to land, but only the right to possession at a certain date, and this by a series of subtle legal fictions. It necessarily followed that a defendant was not estopped in a cross ejectment from showing his title to the lands, because the matter in question between the parties to the former ejectment was not the title to the lands, but only the title to make a lease at a certain date; and, as was pointed out in *Doe* d. *Strode* v. *Seaton* (1), "a judgment in ejectment is not conclusive evidence, because a party may have a title to possession, and to grant a lease at one time and not at another." But as to whatever was in question between the parties, a judgment in ejectment, like every other judgment, worked an estoppel. Thus, under the old law, the plaintiff's right to recover depended on his title to a term commencing from the day of the demise laid in the ejectment, and the judgment was that he do recover the term. The date of the commencement of this term being thus in question between the parties, it was well settled that the defendant in an action for mesne rates was estopped by the judgment in ejectment from denying the plaintiff's title to possession of the lands from the day of the demise as laid. "This judgment like all others only concludes the parties as to the subject-matter of it. Therefore, beyond the time laid in the demise, it proves nothing at all, because beyond that time the plaintiff has alleged no title, nor could he be put to prove any": *Aslin* v. *Parkin* (2). But, as regards the plaintiff's possession at the time of the demise, according to the resolution of the Judges, "the tenant is concluded by the judgment, and cannot controvert the title." The principle upon which these decisions rest is clearly stated by Parke, B., in *Litchfield* v. *Ready* (3).

The legal fictions upon which the action of ejectment formerly

(1) 2 Cr. M. & R. 732. (2) 2 Burr. at p. 668. (3) 5 Exch. at p. 946.

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rested have been abolished, with the result that there is no longer any estoppel as to the time of accruer of the plaintiff's title in an action for mesne rates: *Kenna* v. *Nugent* (1); *Harris* v. *Mulkern* (2). But although the action is now one between real parties, involving the question of the title to the land sought to be recovered, a judgment in ejectment has no greater effect than a similar judgment had before the passing of the statute by which these fictions were abolished: The Process and Practice Act, 13 Vict. c. 118. This, however, is the result of direct legislation, not of any application of the legal principles of estoppel. The 94th section of the Common Law Procedure Act, 1856, was enacted in consequence of a decision of the Court of Exchequer in *O'Donnell* v. *Ryan* (3), in which they held that a judgment in ejectment operated by way of estoppel in respect of title between the parties to the record and their privies.

Thus it appears that in determining the effect of a judgment in ejectment by way of estoppel, we must consider the essential and original character of ejectment proceedings, apart from modern procedure, and from the analogy of the ordinary actions to which these proceedings have been in other respects assimilated. Further it appears clear that a judgment in ejectment, though not conclusive in regard to title, was always conclusive, and worked an estoppel, between parties and privies, not only as regards the plaintiff's right to possession at a certain date, but as regards any matter in question between the parties, the determination of which was necessary in order to entitle the plaintiff to possession.

I now proceed to apply these principles to the action of ejectment for non-payment of rent. This proceeding was in its origin a statutory development of the common law ejectment on the title, founded on the right of re-entry for condition broken. I had occasion when delivering the judgment of this Court in *O'Sullivan* v. *Ambrose* (4) to trace its growth and progress throughout the successive ejectment statutes. It is sufficient for the purposes of the present case to say that, throughout all these modifications, it retained and still retains the legal character of an action founded

(1) Ir. R. 6 C. L. 547; Ir. R. 7 C. [L. 464.
(2) 1 Ex. D. 31.
(3) 7 Ir. Jur. 127.
(4) 32 L. R. Ir. 102.

on possessory right. But in this action the plaintiff's right to possession at a given date depends upon the fulfilment of certain statutory conditions, and a judgment when recovered is followed by certain statutory consequences as between parties to the record and privies.

These consequences are the total destruction of the tenant's interest unless redeemed in pursuance of the provisions of the statute. This consideration does not conclude the question of estoppel, or convert the judgment into a judgment *in rem;* but it is material to bear in mind that the Legislature has determined that a judgment in ejectment for non-payment of rent should have a different result as between parties and privies from that of a judgment in ejectment on the title.

The statutes relating to ejectment for non-payment of rent apply only when there exists between the parties the relation of landlord and tenant, or (as in the present case) some other relation which, by special legislation, has been brought within the operation of the ejectment statutes, and which is to be understood as included when I speak of the relation of landlord and tenant. Where this relation does not exist between the parties, the Courts have no jurisdiction to entertain an ejectment for non-payment for rent inasmuch as it is the creature of the ejectment statutes; and any such proceedings are wholly inoperative and void, as being *coram non judice.*

In cases where the Court has jurisdiction, it is necessary, in order to entitle the plaintiff to recover possession—1, that a year's rent should be due; 2, that this rent should issue out of the lands sought to be recovered.

These two matters are, in my opinion, in question between the parties to an ejectment for non-payment of rent in the same sense in which the existence of the term of years was in question under the old law in an action of ejectment on title; and, applying to this procedure the principles which have always governed the action of ejectment from which it sprang, I have come to the conclusion that a judgment in such an action is conclusive, and works an estoppel, between parties and privies, not only as regards rent, but as regards the identity of the lands sought to be recovered with those out of which the rent issues.

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It has been always held that the judgment in ejectment concludes the question of this statutory amount of rent being due. So long ago as 1786, Lord Lifford, C., said: "I have therefore always been of opinion that such a judgment was good, and that the tenant could not bring another ejectment while the other judgment stood in force against him": *Kenmare* v. *Lessee of Supple* (1). And Lord Redesdale, C., lays it down that, unless the tenant redeems, "No relief shall be given on the question whether so much rent was actually due or not; the statute meant to put that question completely at rest, and that it should never be tried over again unless under the terms prescribed by the statute," that is, on the terms of payment: *O'Mahony* v. *Dickson* (2). I see no reason why the identity of the lands sought to be recovered with those included in the demise should not also be set at rest, or why the defendant should be permitted to have it tried over again.

The cases relied on by the plaintiffs' counsel, in which the defendant in ejectment was held not to be estopped from showing the invalidity of the judgment in ejectment, all proceed upon a clearly defined and well-known principle of general application, according to which proceedings which are void as being *coram non judice* cannot operate by way of estoppel. Thus in *Lessee of Bond* v. *the Trustees of Sterne's Charities* (3), and *Lessee of Black* v. *Davis* (4), the defendant in ejectment for non-payment of rent was allowed to show, in a cross-ejectment on the title, that the relation of landlord and tenant did not exist between the parties to the former action, upon the ground (*per* Bushe, C.J.) that the ejectment statute "only operates between landlord and tenant; and that, if that relation exist, a judgment by default concludes all questions incident to that relation, such as amount of rent, upon which Courts of Law and Equity before the statute had been in the habit of giving relief; but does not conclude the fact that such relation existed when the ejectment was brought." The principle of these decisions was explained with great clearness by Monahan, C.J., in *Coneys* v. *Coneys* (5), and applied to the Civil Bill Act then in force, which conferred a certain jurisdiction in ejectment

(1) Vern. & Scr. at p. 11.
(2) 2 Sch. & Lef. 412.
(3) Batty, 87 n.
(4) Batty, 80.
(5) 8 Ir. C. L. R. 379.

upon the Assistant Barrister in cases between landlord and tenant. The Court there held that the defendant, against whom judgment had been recovered before the Assistant Barrister, was not estopped from showing in a cross-ejectment that the relation of landlord and tenant did not exist, inasmuch as this went to prove that the proceedings in the former ejectment were *coram non judice* and therefore worked no estoppel.

Here, however, the case was admittedly within the ejectment statutes. The Court had full jurisdiction. If the defendants had relied on the partial eviction by way of defence, the plaintiff could have amended, but no amendment would have cured the illegality in *Lessee of Black* v. *Davis* (1) and *Coneys* v. *Coneys* (2). The relation of landlord and tenant (or what is equivalent to it) existing, the judgment, in the language of Bushe, C.J., "concludes all questions incident to that relation, such as the amount of rent," and, I would add, the identity of the lands sought to be recovered with the parcels in the lease.

I can find no case in which the application of the authorities, to which I have referred, to this particular question, has been the subject of decision. The case of *Coneys* v. *Coneys* (2) was referred to in *Clanricarde* v. *Clarke* (3), by the Lord Chief Baron with approval, but he expressed no opinion whatever upon the point which we have to decide, namely, the application of that authority to the case of a partial eviction, and the decision turned upon a different point.

For these reasons I am of opinion that the plaintiffs, Grace Doherty and M'Sheffry, are estopped from disputing the identity of the lands recovered in the ejectment to which they were parties with those out of which the perpetuity rent issued.

It remains to consider the case of the plaintiff John Doherty. He does not claim to be entitled to an estate in possession, and could not maintain an action of ejectment. As regards him, the action is one for declaration of title, and the title claimed is an equitable one in remainder, with certain equitable rights during the lifetime of Grace.

Now, if I be right in my view of the case as regards the other

(1) Batty, 80. (2) 8 Ir. C. L. R. 379. (3) 26 L. R. Ir. at p. 265.

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plaintiffs, the estate of his trustee and that of the tenant for life have both been destroyed by the ejectment proceedings, and he appeals to the equitable jurisdiction of this Court to restore them, in order to give effect to his rights. I will assume, though I do not decide, that these equitable rights are sufficient to entitle him to claim a declaration of title, although his estate in the lands, if it exist at all, is still one in remainder. I will further assume that, as regards him, the ejectment proceedings are *res inter alios actæ*. But still they have determined the estates of tenant for life and trustee, and he is in the position of a plaintiff appealing to the active intervention of equity to restore interests which have been destroyed at law. Now, a plaintiff in such a position was always required to do equity, and he cannot be allowed to put forward a claim inconsistent with a contract or representation by which he is bound. In this view of the case I must have regard to a matter to which I have not hitherto referred, as it did not enter into my consideration of the case in regard to his co-plaintiffs, the parties to the ejectment proceedings.

In the year 1840 a deed of family arrangement was executed by the several persons who were beneficially interested in the lands which were subsequently comprised in the perpetuity grant of 1872. The short effect of this deed was to render Annagh primarily liable to the rent and renewal fines afterwards represented by the perpetuity rent. This deed, as the Vice-Chancellor pointed out (1), did not affect the Land Commission. Edward Doherty, who afterwards purchased the perpetuity rent, was a party to this deed. It is doubtful whether a Court of Equity would have held him bound to give effect to its provisions, notwithstanding his purchase of the perpetuity rent, upon the principle of such cases as *Postlethwaite* v. *Lewthwaite* (2).

However this may be, the existence of the deed of 1840 explains the course taken by both plaintiff and defendants in the ejectment proceedings for non-payment of rent. The parties to these proceedings were all, somehow or another, in privity with the arrangement by which Annagh was rendered primarily liable for the rent, and they apparently acted as if this was a binding arrangement.

(1) 29 L. R. Ir. at p. 195. (2) 2 J. & H. 237.

I am far from saying that the deed of 1840 could have been pleaded as an estoppel by the plaintiff in the ejectment proceedings if the defendants had relied upon the partial eviction as a defence. These proceedings were not founded on the deed of 1840, and there are obvious objections to holding the parties bound by an estoppel founded on that deed. However this may be, it is, in my opinion, a complete answer to the equitable claim of John Doherty in the present action. He claims as a volunteer under Owen Doherty, who is a party to the deed of 1840. This deed contains a covenant for further assurance. John can hold no higher position than Owen, and I am clearly of opinion that Owen would not have been allowed, in the face of this deed and of his covenant, to insist that the rent issued out of all the lands, as a ground for the active interposition of a Court of Equity in his behalf. On this ground, which is a distinct one from that of estoppel, I am of opinion that a Court of Equity is bound to refuse him relief, and that the learned Judge was right in dismissing the action generally, with costs.

O'BRIEN, J.:—

This is an action to establish title, and also to recover land in the possession of the defendant, brought in the names of three persons—a trustee, a *cestui que trust* for life, and a *cestui que trust* in remainder; and, being a cross-ejectment brought after two previous recoveries in ejectment, involves questions undoubtedly of great difficulty, as to what is to be considered the effect of these proceedings and the consequence in law of defects or irregularities attending them. The right of the plaintiffs arises upon a will by which a person who was in possession of certain of the denominations of land held under a lease for lives afterwards converted into a fee-farm grant, and subject to the whole rent, devised his interest to two trustees, to hold for his widow Grace Doherty for life and his son John Doherty in remainder, with certain trusts for the maintenance and education of the son during the life estate, and certain powers and directions which, it appears to be considered, would have the effect of keeping the legal estate in the trustees. The title of the testator himself was derived, through his father Owen Doherty, under a deed of family settle-

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ment made in the year 1840, by which the lands of Annagh were conveyed to trustees named, in trust to permit and suffer Owen Doherty to receive the rents and profits, upon trust to apply the same in the first instance in each and every year in renewing and procuring new leases, and, after deducting all expenses and fines, to have one-sixth for his own benefit, besides the lands of Termaine assigned to him exclusively. The deed of 1840 recited that the lands of Annagh were devised by Owen's own father with a direction that they should pay the head-rent and the renewable fines payable out of all the lands held under the See of Derry; and that course appears to have been always followed.

William Doherty, in the year 1872, purchased from the Church Temporalities Commissioners the perpetuity in the lands, subject to £119 14*s.* 7*d.* yearly rent, and made a mortgage of the same date to secure the amount of the purchase-money. The rent upon the fee-farm grant was purchased in 1878 by the defendant, and the rent having fallen into arrear in 1882, he brought an action in 1883 for recovery of the whole of the lands for non-payment of rent. This action was not proceeded with, and in 1883 he brought another action for non-payment of rent against the lands of Annagh alone. I draw the conclusion from the evidence given before Mr. Justice Holmes, that this ejectment was properly served in a manner sufficient to evict the interest of the tenant if the ejectment had been regularly brought for the whole of the lands. Mr. Justice Holmes states in his report that the service on the trustee was sworn to in the affidavit, and his only denial consisted in the statement that he was not aware that a copy of the writ had been left at his house, but that he knew about the ejectment at the time from Grace Doherty, who was his sister. Grace Doherty gave a consent for judgment in the action, and was allowed to remain as a caretaker, and signed an attornment. There are two usual forms of attornment in use, one by which the person becomes tenant at a rent during the six months' period of redemption, and the other by which the person becomes a caretaker simply. The attornment was not produced upon the argument, but I assume it was in the latter form. At that time John Doherty, the son, was of the age of nineteen years. Grace Doherty afterwards refused to give up possession, and an ejectment on the title

was brought against her, in which judgment was obtained by default. The trustee and the widow and son have now brought a cross-ejectment, after so long a lapse of time, to recover back the lands, based upon the supposed effect of the irregularity in the former ejectment for non-payment of rent having been brought against part of the lands only, though against the persons who undoubtedly owed the whole rent, as making the whole proceedings void. In the year 1892 the Land Commission, who now represent the Church Temporalities, and to whom the purchase-money of the perpetuity still remains due, and who were not served with, and had no notice of, the ejectment proceedings in 1883, brought an action in Chancery, seeking to have it declared that the lands of Annagh were well charged with the amount, notwithstanding the proceedings in ejectment, and they obtained a decree from the Vice-Chancellor to that effect. It is manifest, of course, that the present litigation was set in motion by the result of that action, which was stated several times to involve a decision that the ejectment was wholly void and a nullity as to all parties whatever, and that the plaintiffs could recover back the lands. I do not find, however, that the decision of the Vice-Chancellor goes at all to that length. He states the argument on behalf of the Land Commission to be, that the ejectment was void as regards them. I quote the words of his judgment which appear to be strongest in favour of the plaintiffs' contention:—"The objection to this judgment is not for irregularity, in which case the only proceeding would be by motion to the Division in which it was entered. It is that the whole proceeding was unfounded in law, and void; and that whatever effect it may have, if any, by way of estoppel upon the parties to it, it cannot affect the title of persons neither parties nor privies, and that they are entitled to maintain an action, in the nature of a cross-ejectment, to recover the possession, or otherwise enforce their rights which have not been bound by this void proceeding." These observations, both in reference to a motion to set aside the judgment and as to the proceedings being void, must be understood of those to whom they were applied, namely, those who are not estopped or who are not parties or privies, and must be understood to except those whom they do expressly except. We cannot give to the Vice-Chancellor's

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decree itself the effect of a judgment *in rem*. That is not possible in the nature of things. We cannot put back the tenants who may not wish it themselves, though the result must be to give the mortgagees a new kind of security—a charge upon the reversion in the lands of Edward Doherty, instead of upon the tenancy. Therefore, for that purpose at least, the tenancy as to part of the lands is gone. How can we determine the point of the difference between an irregularity—which the ejectment for part, of course, was—and a nullity, otherwise than by reference to the words of the statute. The Act of Parliament says that when a year's rent is in arrear, the landlord shall be entitled to bring an ejectment. The defendant is not less the landlord of Annagh because he is of the other part. The rent is in arrear, for it issues out of these lands as well as the rest, and, as between all parties, is payable out of them alone. The conditions of the statute, therefore, are in terms satisfied. The relation of landlord and tenant and the rent in arrear are the foundation of the right; the rest is a matter of irregularity merely. There are objections, of course, to an ejectment not including the whole of the lands, founded on the nature of tenure, and the provisions for redemption, which make such a proceeding highly inconvenient and embarrassing. But have they the effect of rendering it altogether void? The rights of the other tenants are not barred. They still hold their portions under the fee-farm grant. The right to the rent as against them is extinguished by the act of the landlord in taking into his own hands the land which was alone subject to the rent. It appears from the evidence the whole rent was for many years paid by Grace Doherty; and the other tenants were, no doubt, wholly unconcerned about it, and to all intents and purposes held their own parts in severalty, and never thought of their having any common title at all, until the construction put upon the Vice-Chancellor's judgment suggested the idea of a flaw of which advantage could be taken to undo what has existed for years. *Lessee of Black* v. *Davis* (1), which is the foundation for the argument of the plaintiffs, was not a case at all of the same kind of defect as the present. The relation of landlord

(1) Batty, 80.

and tenant did not exist in that case at all. The plaintiff could not have maintained the ejectment against anyone or under any circumstances. But, now, let us see what are the consequences to which the present action, if successful, must lead, either as to the ejectment or declaration of title. Grace Doherty, it is clear, cannot recover unless all reason is banished from the law; for she not only gave a consent for judgment, but became a party to a contract, by which she obtained the possession without paying any rent. Her estate, therefore, must be gone. Yet there must be a tenant, whichever be the form of relief, whether by ejectment or declaration of title. For I cannot understand how the lease could be declared to subsist, for the sake of John's remainder or of the provision for him during the life estate, without a continuing tenancy. There must be some one in the meantime to answer the engagements of the tenancy. The tenant therefore must be the trustee, who is himself affected by the estoppel as well as Grace Doherty. Must he, therefore, during Grace's life, pay the rent while her estate is cut out of the trust, or must John's remainder be accelerated and turned into an estate in possession? This brings us round to the inevitable result, that they must all go back, or none. My opinion is, that they are all concluded by the judgment in ejectment for non-payment of rent, until it is set aside; that the trustee legally represented the interest in remainder for the purpose of the ejectment; that the defect in the proceedings was an irregularity, such as would be ground for a motion to the Court, but did not make the ejectment void, and that it would be contrary to law, as well as reason and justice, to disturb the possession under the judgment, which all the parties acquiesced in—altering their own relations for so long a period, with the result of putting back the tenants under the same liability as to the rent, and subject to the same obligations, which would have been sufficient to maintain a regular ejectment against them.

Sir Peter O'Brien, L. C. J.:—

I have had the advantage of reading the judgment of my brother Madden, and I concur; but I must say I thought the case one of great difficulty. One would imagine that the point here raised would have been decided long ago; but it has not been de-

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cided. The case presents itself shortly in this way. We are bound by the Vice-Chancellor's judgment in everything except, in my opinion, the estoppel point. Mr. Ross admitted that he could not argue here that, as against a stranger, we were not bound by that judgment. He said it would be otherwise in the Court of Appeal, and that he could there argue that the Vice-Chancellor's judgment is not sustainable. His contention was that the question of estoppel in reference to the parties to the ejectment proceedings for non-payment of rent was left open by the Vice-Chancellor in his judgment. In dealing with the case, therefore, I take it that I am bound by the Vice-Chancellor's decision, and that, so far as strangers are concerned, it is a valid decision, and, if questioned, can be questioned only in the Court of Appeal. Then comes the question of estoppel, which was left open. The cases chiefly relied upon by Mr. Wylie, in his very able argument, were *Black* v. *Davis* (1) and *Coneys* v. *Coneys* (2). Mr. Ross contended that these cases were distinguishable, and the distinction which he drew is, I think, well founded, though the matter is far from clear. Mr. Ross said:—Yes, *Black* v. *Davis* (1) decided that a party is not concluded where the relation of landlord and tenant does not exist at all. The case of *Coneys* v. *Coneys* (2), in which the relation of landlord and tenant did not exist, was *coram non judice;* but here (he said) the relation does exist, and the point, that that relation extended to more lands than were comprised in the ejectment, can be taken advantage of by special plea, and thus *Black* v. *Davis* (1) and *Coneys* v. *Coneys* (2) can be met. With reference to this, I think that Mr. Ross was right. In those two cases the relation of landlord and tenant did not exist, and the proceedings were *coram non judice.* Here the relation did exist, though it extended to other denominations than those comprised in the ejectment, and the point could be taken advantage of under a proper special plea.

Thus I think that the cases upon which Mr. Wylie relied—of which *Black* v. *Davis* (1) was the principal—are distinguishable; but I should wish to say a word upon the question whether estoppel applies in cases of ejectment for non-payment of rent.

(1) Batty, 80. (2) 8 Ir. C. L. R. 379.

What is recovered in any ejectment, whether the action be defended or judgment is obtained by default or by consent? Where defended, the judgment is that the plaintiff do recover possession. It is the same in the other cases. What was the issue under the Common Law Procedure Act? Whether the plaintiff is entitled to possession. What was the issue mainly involved in this case? It was whether the plaintiff is entitled to possession. Take *Priestman* v. *Thomas* (1)—a case cited at the bar. It appears to me that this clearly states the general rule, that the judgment is conclusive as to the main issue in the action. The judgment is that the plaintiff do recover possession of the lands in controversy—the very identical lands in question. Once fictitious parties were abolished, I do not see why such a judgment on the same state of facts (I am not dealing with matters arising subsequently to the judgment) should not be conclusive. However, there is the section of the Common Law Procedure Act of 1856, which says that a judgment in ejectment shall have no greater effect than it originally had; and for the reasons assigned by my brother Madden, though with great doubt, I have come to the conclusion it is conclusive between the parties as long as there has been no alteration in the *status* and rights of the parties arising by reference to matters subsequent to the judgment.

Now, with reference to John Doherty, I own I am much exercised. Estoppel does not apply to him. He was not named as a party in the ejectment for rent. He was not named as a party, nor was he served; and estoppel binds parties and privies only. He was neither privy in blood nor privy in estate. He was a stranger to the proceedings. Thus, assuming the Vice-Chancellor's judgment to be well founded, and that he was a stranger to the proceedings, the ejectment would be void as regards him. Then comes the question, Is there any equity as against him arising out of the deed which put the rent upon Annagh? and is he bound by his trustee being named as a party? Trustees originally did not in equity represent the *cestuis que trustent*. As my brother Madden pointed out during the argument, they only represented them so far as they were statutably empowered to do so. What

(1) 9 P. D. 210.

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is the equity against him if the judgment in ejectment was void, so far as he was concerned? What was the measure of his obligation? I am not altogether satisfied that the measure of his obligation—the condition of his preservation of his rights—was not merely that he should pay the rent, and that accordingly we should grant him relief if the rent was paid, or he was willing to pay it. However, my brother O'Brien has pointed out so many difficulties in affording him alone relief, that I will not dissent from the opinion entertained by the other members of the Court. The case, in every branch of it, is one of considerable difficulty, and it is strange that the main point, as to estoppel, has not been already expressly decided.

A. E. R. J.

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Jan. 23, 24, 25. Feb. 11.

The plaintiffs appealed (1).

Meredith, Q.C., and *Wylie, Q.C.*, for the appellants:—

There are two points to be decided—(1) Whether the judgment in the ejectment was null and void, and (2) If it was, is there anything to estop any of the parties from alleging its invalidity.

As to the first branch, an ejectment can be brought in one or other of two ways—either on a condition of re-entry, or under the ejectment statutes. An ejectment on the condition for re-entry could only be brought to recover the entire of the premises, because the condition is not distributable: *Warrington* v. *Hodgens* (2); and the same principle was applied to an ejectment under the ejectment statutes: *Delap* v. *Leonard* (3). In the judgment in ejectment they always spoke of evicting the lease and not the lands. The condition was not apportionable: *Davis* v. *Black* (4); *Jackson* v. *Jackson* (5); *Coneys* v. *Coneys* (6). The Act of 1860 applies only to actions for evicting the whole lease, with

(1) In the Court of Appeal, before Walker, C., Porter, M.R., and Fitz Gibbon and Barry, L. JJ.

(2) Batty, 311.

(3) 5 Ir. L. R. 287, 301.

(4) Batty, 80.

(5) Hay. & Jon. 442.

(6) 8 Ir. C. L. R. 379.

certain exceptions which are mentioned in sect. 44. That section provides that in three special cases the landlord may proceed to evict portion of the demised premises, and it is not contended that this is one of these.

The ejectment of 1883 was not within the ejectment statutes, and the judgment therefore was void, as it was *coram non judice*: *Bond* v. *Trustees of Sterne's Charity* (1).

Secondly, this judgment in ejectment being void, it cannot be an estoppel. Anything done under a void judgment is a nullity. In the same way, anything done under a void deed is a nullity: *Gillman* v. *Murphy* (2). That was an assignment of a lease, containing a non-alienation clause. If there is anything done under a void judgment it may be an estoppel, but there was nothing done here. It did not appear on the face of the former proceedings that it was only a portion of the lands that were being evicted, and no issue on that point was raised in the action. If there has been a previous action between the same parties, founded upon the same contract, and the defendant has suffered judgment by default in that action, he is not precluded from setting up in a subsequent action any defence which he could have pleaded in bar to the former: *Howlett* v. *Tarte* (3).

Ross, Q.C., and *Rynd*, for the defendant:—

1. The proceeding to evict Annagh only, if it was wrong was only an irregularity, and the judgment is binding until it is set aside. The reason why this particular procedure was adopted is obvious: the expense of serving all the tenants would be so great; and by the agreement between the parties, Annagh was to bear the rent of the entire. The observations of Palles, C.B., in *Clanricarde* v. *Clarke* (4) show that an ejectment against one denomination comprised in a lease is not absolutely null and void: see also *Kenmare* v. *Supple* (5).

2. Even if the former ejectment were null and void, Grace Doherty and M'Sheffry, who were parties to the action, are

(1) Batty, 80.
(2) Ir. R. 6 C. L. 34.
(3) 10 C. B. (N. S.) 813.
(4) 26 L. R. Ir. 260.
(5) 1 Vern. & Scr. 1.

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estopped from denying that the lands recovered are the only ones out of which the rent issued. If a person is a party to a record, in which an issue is raised directly, he cannot raise that question again: *Priestman* v. *Thomas* (1); *Flitters* v. *Allfrey* (2); *Reynard* v. *Mayne* (3).

Coneys v. *Coneys* (4), and that class of cases, do not apply. That was the case of a civil-bill decree in ejectment, *prima facie* regular; but it was held not binding on the parties to it, because the facts showed that there was no relation of landlord and tenant existing between the parties.

Feb. 11.

WALKER, C.:—

In this case it appears that William Doherty under a renewal lease of 1871 held the lands of Clonmany as lessee under the See of Derry. Clonmany included lands called Annagh, and also other lands. Those other lands were and are of considerable extent, and are in the hands of occupying tenants. All the lands are of course subject to the one rent.

On the 21st October, 1872, William Doherty, under the provisions of the Church Temporalities Acts, obtained a grant in perpetuity of the lands of Clonmany at the rent of £119 14*s.* 7*d.*, and a mortgage was executed to secure the purchase money amounting to £842 17*s.* 2*d.* This mortgage became vested in the Irish Land Commission. William Doherty had a beneficial title to Annagh only, and took the grant as trustee for others as to the remaining lands, and it appears that under a deed of family arrangement the lands of Annagh as between the various denominations were made the primary fund for payment of the head rent. The landlord was not of course bound by this arrangement.

William Doherty died in 1876, and by his will he devised the lands of Annagh to James M'Sheffry in trust for Grace Doherty for life with remainder to John Doherty. Those three persons are the plaintiffs in the present ejectment.

(1) 9 P. D. 210.
(2) L. R. 10 C. P. 29
(3) Cooke & Alc. 12.
(4) 8 Ir. C. L. R. 379.

The perpetuity rent of £119 14*s.* 7*d.* became vested in Edward Doherty, and this rent having fallen into arrear, he, in 1883, brought an ejectment for non-payment of rent against all the lands comprised in the perpetuity grant. This action was regular, and if duly proceeded with would indisputably have evicted the interest. He, however, discontinued this action, and brought a new one for the entire rent, in which he omitted all the lands other than Annagh, and served with the ejectment only Grace Doherty and James M'Sheffry, and the under-tenants of Annagh. Grace Doherty took defence, but afterwards gave a consent for judgment, and judgment was entered for the recovery of Annagh on the 15th December, 1883, and an *habere* was executed on the 2nd February, 1884, but Grace Doherty and the under-tenants were put back into possession as caretakers. They, however, afterwards refused to give up possession, and an ejectment on the title was brought against them, in which judgment was obtained by default, and an *habere* executed on the 4th May, 1886, under which Edward Doherty went into possession of Annagh, and so continued.

Edward Doherty, after the recovery of Annagh, disputed the right of the Irish Land Commission to be paid out of it the principal or interest of their mortgages, and accordingly those mortgagees instituted an action in the Court of the Vice-Chancellor to establish their rights against Annagh and the other lands, and the Vice-Chancellor by his judgment dated 28th March, 1892, declared that the Irish Land Commission were entitled to be paid out of all the lands, notwithstanding the proceedings in the ejectments against Annagh. The Irish Land Commission were not named as defendants in those proceedings, nor served with the ejectment, nor was it necessary for the regularity of the proceedings that they as mortgagees should be so named as defendants. The Vice-Chancellor in his judgment, at p. 194 of 29 L. R. I., says:—"The objection to this judgment is not for irregularity, in which case the only proceeding would be by motion to the Division in which it was entered. It is that the whole proceeding was unfounded in law, and void, and that whatever effect it may have, if any, by way of estoppel upon the parties to it, it cannot affect the

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title of persons neither parties nor privies, and that they are entitled to maintain an action in the nature of a cross ejectment to recover the possession or otherwise enforce their rights which have not been bound by this void proceeding. I am of opinion that this is the correct view of the position of the parties."

On the 10th February, 1893, James M'Sheffry, Grace Doherty, and John Doherty, brought the present action of ejectment on the title against Edward Doherty to recover back the lands of Annagh. The case was tried before Mr. Justice Holmes without a jury at the Summer Assizes for the city and county of Londonderry, and he directed a verdict for the defendant, but for convenience took an account between the parties for the preceding six years, not charging Edward Doherty with any profits received previously, and not allowing him credit for any arrears of the fee-farm rents that accrued before that period, but giving him credit for the fee-farm rent payable during it. Upon this principle he found the amount of mesne rates in respect of the lands of Annagh with which Edward Doherty was chargeable (if his possession had been wrongful), to be £99 3*s.* 9*d.* The plaintiffs before us waived any claim for mesne rates, allowing rents to go against profits.

James M'Sheffry and Grace Doherty, the present appellants, contend that the judgments and *habere* in the ejectments by Edward Doherty are wholly inoperative and void, and furnish no defence to this action. Edward Doherty, on the other hand, insists that till set aside they furnish a complete answer on two grounds: 1, that the proceeding to evict Annagh only was no more than an irregularity, and that the judgment binds till set aside by the Divisional Court; 2, that at all events Grace Doherty and James M'Sheffry, who were parties, are estopped by the judgment from denying that the lands recovered are the only ones out of which the rent issued.

Mr. Justice O'Brien, in the Queen's Bench Division, was of opinion that the leaving out of part of the lands and eviction of part amounted only to an irregularity, and ground for moving the Divisional Court to set aside the judgment and *habere.* This view is contrary to that of the Vice-Chancellor in *The*

Irish Land Commission v. *Doherty* (1), and also apparently to that of Mr. Justice Madden who founded his judgment upon an estoppel against James M'Sheffry and Grace Doherty which he has held to exist.

This is not a case in which there has been an irregularity in the mode of service of defendants under the ejectment statutes, but a deliberate omission of a large denomination, and an entry under the *habere* into Annagh only, following up that omission; and it is conceded that the owners of the omitted denominations have substantial interests in them and have an undisturbed possession. The defendant did not enter into the whole, and it is not a case in which having a right for conditions broken to re-enter the whole, he is in possession of the whole, and his possession can be referred to his title at common law.

It has been long considered as settled law in this country that a lease cannot be partially evicted by an ejectment for non-payment of rent: see *Warrington* v. *Hodgens* (2), and the reason is given by the Chief Baron in the case of *Stuart* v. *Smith* (3) in the note to *Warrington* v. *Hodgens* (2), where he says:—"But then it is justly urged for the defendants that there cannot be a partial eviction of the estate, that the contract being entire must be put an end to altogether or not at all. That is true in this sense," he adds, "that there cannot be an eviction of a few acres, and not of some others held under the same lease elsewhere."

I do not think the case is one where there has been an irregularity in procedure merely, but an error going to the root of the whole of the proceedings and the title founded upon them. The ejectment proceedings subsequent to those in the ejectment for rent rest, I think, upon those as their foundation, and furnish no higher ground of defence. The difficulty in the case arises, I think, upon the second branch of it, viz. whether James M'Sheffry and Grace Doherty can now sustain their cross-ejectment on the title for Annagh, though they were served and judgment had against them for that part. John Doherty, I think, may be left out of consideration as having been sufficiently represented by his trustee.

(1) 29 L. R. Ir. 185. (2) Batty, 311. (3) Batty, 316, 318.

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In considering this question the character of an ejectment on the title must be constantly kept in view, and also the fact that an ejectment for rent is only a statutory development of the common law ejectment on the title founded upon the right of re-entry for conditions broken. I see nothing to interfere with the old doctrine that a right of entry was not apportionable.

Mr. Justice Madden was of opinion that the judgment works an estoppel against the tenant that the lands, the possession of which was awarded and against which the *habere* was executed, were the only lands in the lease out of which the rent issued, but I think the question is not one of the identity of the lands but of jurisdiction, when the landlord has chosen to forego bringing the lands in the lease before the Court. The old character of the action of ejectment and judgment in it still, I think, adheres to the modern representatives of them. A judgment in ejectment only determined the right to the immediate possession, and a cross-ejectment could always be brought to try the title. Since 1856 at all events a judgment in ejectment has only its old force.

It is settled ever since the cases of *Black* v. *Davis* (1), and *Bond* v. *Trustees of Sterne's Charities* (2), that, notwithstanding a judgment and *habere* in an ejectment for rent, a cross-ejectment on the title may be maintained by the tenant, where the judgment is invalid owing to the absence of the relation of landlord and tenant at the time the ejectment was brought. There the reversion had passed to a mortgagee and was in him when the ejectment for rent was brought by the mortgagor.

Here, if I am right, there was no legal power to operate upon the subject-matter under the ejectment statutes in the way attempted. It is not enough to say that this matter might have been pleaded as a defence, for so could the non-existence of the relation of landlord and tenant. *Black* v. *Davis* (1) is a conclusive authority as to the non-existence of estoppel in that case. I shall assume that the judgment would conclude any question as to the amount of rent, as it certainly would any question as to its

(1) Batty, 80. (2) Batty, 87 n.

amount in the proceeding under the redemption statutes. Further, the objection alleged here is not the manner in which the rent was ascertained.

In *Kenmare* v. *Supple* (1) and *Jack* d. *Lowry* v. *M'Roberts* (2) the alleged invalidity consisted in the manner of the ascertainment of the rent. The general observations of Lord Lifford must, I think, be taken in reference to the case before him. *Doe* d. *Hitchings* v. *Lewis* (3) goes no further. The alleged defect there was the absence of an affidavit of the rent under the 4 Geo. 2, c. 28, but the case stated assumed an ejectment under that Act, and there was a twenty years presumption of *omnia rite acta*. Lord Mansfield says at p. 618:—"And the case does not state affirmatively that the judgment was irregular, or expressly and explicitly that there was no affidavit at all, or indeed anything whatsoever to take off a presumption which is immensely strong the other way. For Edward Hitchings acquiesced under this judgment, execution, and possession for almost twenty years, and never tendered the rent and arrears together with costs pursuant to the Act, nor filed any bill for relief in equity within six months after the execution executed, nor indeed at any subsequent time, so that he is barred by the statute and foreclosed from all relief or remedy in law or equity other than by writ of error, and the landlord is by virtue of the Act of Parliament to hold the premises discharged from the lease upon supposition that his former proceedings were regular." Further, the judgment and eviction furnish a presumption that the proceedings were valid: *Long* v. *Disney* (4); and the *onus* is on the tenant to show invalidity.

It is true that it should be borne in mind that in considering the difficulty arising from the indivisibility of the right of re-entry it is not now necessary to allege or prove the existence of any clause or condition of re-entry, but I think the rights founded on the implication of its existence must be legally pursued.

If it was not lawful to evict part of the lease I do not think the judgment is an estoppel. If it is, I think it should have been

(1) Vern. & Scr. 1.
(2) 1 Jebb. & S. 135.
(3) 1 Burr. 614.
(4) 2 H. & B. 113.

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equally so in *Black* v. *Davis* (1), that the relation of landlord and tenant did exist, and I would think that in this case the landlord is in a worse position, for he has attempted to give effect to his judgment in an unauthorised manner. His possession, I think, must be attributed to possession under the *habere*: *Doe* d. *Stephens* v. *Lord* (2). Again the right to redeem and right to evict, must, I think, be correlative. The large portion of the lands not recovered is still held under the fee-farm grant, but the landlord under the statute is to hold the premises discharged of the lease. Can the tenants of the other part redeem, or are they liable to another ejectment for rent? A lease is not determined by a judgment in ejectment. There must be an *habere* actually executed. The tenants in possession of the other denominations would have become defendants if served, and it was entirely the fault of the landlord to have taken only a partial judgment and attempted a partial eviction. If the rent issuing out of those other denominations is not extinguished, against whom have its tenants a right of contribution if they can be sued for it?

All those inconveniences illustrate the difficulty of holding that there can be eviction for part. It was said that in *Clanricarde* v. *Clarke* (3), the Lord Chief Baron had expressed an opinion favourable to the respondents in this appeal. I think, and I am confirmed in that by a communication from the Chief Baron to me, that in *Clanricarde* v. *Clarke* (3), he founded his judgment upon estoppel by entry, and did not express any opinion upon the question that arises in this case.

Upon the whole I am unable to free the landlord from the difficulties in which he involved himself by the course he adopted, and am of opinion that judgment should be entered for the plaintiffs and the appeal allowed.

Porter, M. R.—

I think the decision appealed from was correct, and mainly for the reasons embodied in the judgment of Mr. Justice Madden, which I adopt.

The plaintiffs cannot succeed unless the proceedings (including

(1) Batty, 80. (2) 7 Ad. & E. 710. (3) 26 L. R. Ir. 260.

the judgment), in the ejectment brought by the present defendant in 1883, for the recovery of the lands of Annagh (comprising in that general name all that went with Annagh), were not only irregular and voidable, but absolutely null and void. There is in the report of the learned Judge who tried the case no question but that that judgment, if valid at all, bound not only Grace Doherty, who was equitable tenant for life under her husband's will, but also James M'Sheffry, who was devisee in fee, and every person in possession of the lands of Annagh. John Doherty, who was a minor in 1882, and was equitable tenant in remainder subject to his mother's life estate under his father's will, cannot for the present purposes be in a better position than James M'Sheffry, his trustee. I may say, however, that I should have been prepared to acquiesce in any suggestion to strike his name out of the proceedings, and said so during the hearing, though I do not entertain any doubt, nor so far as I know is any doubt entertained by any member of the Court, that if the ejectment proceedings bind M'Sheffry, they also bind for present purposes the equitable interest of John Doherty, who can only claim through him.

The judgment in ejectment was followed by a writ of *habere*, under which complete possession was given to the present defendant, shortly after December, 1883. Afterwards the present plaintiff, Grace Doherty, and all the under-tenants in possession of Annagh duly attorned as caretakers in February and May, 1884. This was followed by an ejectment on the title on which judgment was obtained in January, 1886, followed by an *habere*, and possession in May, 1886. Since that time Edward Doherty has remained in possession, and no rent has been paid or tendered by any of the persons who now claim the benefit of the fee-farm grant, as a subsisting interest, unaffected by any of the proceedings I have mentioned. The groundwork of the plaintiffs' claim is that the ejectment for non-payment of rent was brought for Annagh alone, while Annagh was only one of the denominations comprised in the grant, and that in consequence the judgment was not only irregular but absolutely void, even as to parties to it, and that the *habere* was null and void, the attornments were null and void, and the subsequent ejectment on the

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title inoperative. As to the last-mentioned proceeding, it does not appear to have been brought against either M'Sheffry or John Doherty. The latter, I gather, attained age in 1886. There can be no doubt but that M'Sheffry knew all about the proceedings subsequent to those directly under the ejectment for the non-payment of rent, though this is not distinctly found. He is brother of Mrs. Doherty, and trustee, and of course bound to look after the interests of his sister and *cestuis que trustent*, though technically he is not affected in such a way as to be estopped by anything, such as this proceeding, to which he is not a party.

The original ejectment for non-payment of rent was apparently regular and right, including all the lands subject to the fee-farm rent in the grant. That action, however, was discontinued. It is easy to understand why. The plaintiff then (now the defendant), was by himself and tenants in possession of the lands other than Annagh, and the service upon all those tenants would be a troublesome and (it was supposed) unnecessary proceeding. Further, Annagh was by agreement binding upon all parties interested under the grant, bound to indemnify the other lands against the rent. When the rent fell into arrear it ought to have been paid by the owner of Annagh. No wonder the action was restricted by the owner of the remaining lands, who was also entitled to the whole rent, to the lands which in justice, as between themselves and the other lands, were alone liable to it. But while one can understand this, it was clearly wrong in point of procedure. The rent issued out of all the lands of Clonmany. Conditions at common law are not severable. The rent, though it issued out of Annagh, also issued out of other denominations. The ejectment, therefore, was wrongly framed, and the action might have been defended, with the result that the defendants would have succeeded, and so the plaintiff would have been put to bring a new action, or might have obtained liberty to amend, involving the service of all the persons in possession of the lands other than Annagh. Further, it may be that, even after judgment, the proceedings, including the judgment, might have been set aside on terms for irregularity ; though I greatly doubt whether after defence filed and deliberately withdrawn, and consent for

judgment given, this would have been done if the Court was informed as to the facts relating to the binding agreement by which Annagh was to bear the whole rent in ease of the other lands not included in the ejectment while that rent was unpaid and unsecured. Further, the law allowed the defendant a period of six months in which to redeem on payment of rent and costs. In an ordinary case, it might be inequitable to press this against the tenant of a part only of lands subject to an entire rent, because that would be to throw on him the entire liability. But here he was already under that liability by agreement. The period of redemption was permitted to expire, and until the suggestion made in the Court of the Vice-Chancellor in the case of *Irish Land Commission* v. *Doherty* (1), it was apparently not dreamt of by anyone that there remained any rights in the present plaintiffs not barred by what had passed. It was not argued, nor could it be contended, that if the defect in the ejectment proceedings for non-payment of rent was of a character such as could be cured by laches or waived by conduct, it has not been so waived or cured. Therefore it is that the present plaintiffs are driven to argue that the whole proceedings were and are absolutely null and void even as between the parties to them, that they estop nobody, and are mere waste paper. It is admitted by counsel for the plaintiffs, in answer to a question put to him by me, that his argument must extend to this, that the judgment and writ of *habere*, though not set aside, were void even as against strangers and would afford no protection to a sheriff (for instance) acting under them. On the other hand, it was also admitted that if they were not absolutely void but irregular and voidable merely, they would estop the parties and defeat their action until set aside.

The consequences of yielding to the plaintiffs' contention appear to me so formidable, I may indeed say so startling, that I shrink from so doing unless coerced by authority. It does not follow because a proceeding is wrong that it is therefore void, and parties may pretermit their right to dispute voidable transactions. Here Mrs. Doherty did so in terms when she consented to judgment and attorned, thereby accepting from the defendant an

(1) 29 L. R. Ir. 185.

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interest in the lands inconsistent with her former title. It is to be remembered that the effect of the judgment cannot depend upon the views present to the mind of the plaintiff. If it is void on the mere ground that a condition cannot be severed, a proposition which is plainly true, it is void even if the omission of part of the lands subject to the rent was accidental. That is a strong proposition. It would be void too even though the defendants acquiesced in the omission in order to save themselves the costs which would have been occasioned by services or otherwise in respect of the omitted lands--not merely voidable but void. What is the authority for such a proposition? The case chiefly relied on to support it was *Coneys* v. *Coneys* (1), in which it was held by the Court of Common Pleas that a civil bill decree in ejectment, *prima facie* regular, was not binding upon the parties to it, the facts and the finding of a jury showing that the relation of landlord and tenant necessary to confer jurisdiction did not subsist between the plaintiff and the defendant at all. This decision did not depend upon any distinction between a civil bill decree and a judgment in the Superior Courts, and must be taken as an authority that where the relation of landlord and tenant is necessary to confer jurisdiction, neither a civil bill decree nor a judgment is conclusive as to the existence of that relation. Monahan, C.J., says (p. 393):—"In conclusion, therefore, we are of opinion that the jurisdiction of the Assistant Barrister is, according to the express provisions of the Act, confined to cases between landlord and tenant, and that, though the Assistant Barrister must necessarily inquire whether the relation of landlord and tenant exists, yet this is merely a preliminary inquiry to enable him to know whether he will judicially entertain the case, and that there is nothing in the Act, expressly or by necessary implication, rendering the determination of the Assistant Barrister in this preliminary matter binding on the parties, and therefore that it was competent for the plaintiffs in the proceedings before us to show, as they have done, that such relation did not in fact exist, and that the preceedings were *coram non judice*."

The decision in *Coneys* v. *Coneys* (1) was founded to a consider-

(1) 8 Ir. C. L. R. 379.

able extent upon that in *Lessee of Black* v. *Davis* (1), in the King's Bench. In that case the first ejectment for non-payment of rent was brought by one who had parted with his legal estate by way of mortgage, so that he was not landlord of the premises, and his ejectment ought to have been defeated. He, however, obtained a judgment by default, which in a cross-ejectment was held to be null and void. Bushe, C. J., at p. 103 says:—"These anomalous consequences show that the construction put upon the statute by Mr. Bell and Mr. Holmes is the sound one, viz., that it only operates between landlord and tenant, and that *if that relation* exist, a judgment by default concludes all questions incident to that relation, such as amounts of rent, upon which Courts of law and equity before the statute had been in the habit of giving relief, but does not conclude the fact, that such relation existed when the ejectment was brought."

Whether these decisions might or might not have been questioned at their date (and *Black* v. *Davis* (1), was decided nearly seventy years ago), they have not been overruled down to the present time, and assuming that they must be now treated as law, the question still remains, do they apply to a case like the present? In my opinion they do not. I am very clearly of opinion that the relation of landlord and tenant (assuming that relation to lie at the root of the jurisdiction) did subsist between the plaintiff and the defendants in the ejectment for non-payment of rent in respect of the premises (being the lands of Annagh) comprised in that proceeding. No doubt, the relation of landlord and tenant was not in respect of Annagh alone, but of Annagh and other denominations. The defendants were tenants of Annagh to the plaintiff, though they were tenants of the other premises also under the same contract of tenancy. The rent in arrear issued out of the whole, that is, out of Annagh as well as the remaining lands. Conceding, what everybody knows, that an ejectment for non-payment of rent under the statutes is in this respect similar to an ejectment at common law under a clause of re-entry for condition broken, and that a condition is not severable so as to justify a partial eviction, I

(1) Batty, 80.

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think there was jurisdiction to entertain the case, even though (without an amendment), the defendants might have been entitled to succeed, and that *Black* v. *Davis* (1) and *Coneys* v. *Coneys* (2) do not apply. If they did apply to such a case, the accidental omission of one out of many denominations of land held together would result in our being obliged to hold that an otherwise regular judgment would be not only voidable but void, as being wholly without jurisdiction, for the jurisdiction of the Court can hardly depend upon the state of mind or intentions of the plaintiff. I cannot think this is the law. I entertain no doubt, or rather only such doubt as must necessarily be occasioned by the fact that my learned brethren differ from my view, that the defect was merely an irregularity which could be and was cured.

We were much urged, and I rather think some members of the Court were impressed, by an argument which as I understand it was as follows:—"The mortgagees of the interest now in the plaintiff are not bound by the ejectment proceedings. The Vice-Chancellor has held that their security is valid. It would be an anomaly to hold that the security is good, and yet the estate on which it is charged is gone." But it is to be remembered that the estate is a fee-simple, and there can be only one fee. The mortgage is charged upon the fee, and cannot be disturbed save by some proceeding valid in itself, or the validity of which the mortgagor is estopped from disputing. Since Deasy's Act, 23 & 24 Vict., c. 154, an estate in fee-farm subject by contract to a rent is within the ejectment statutes, although there is not and cannot be any reversion to which the rent is incident. And I do not think the case is different, so far as the mortgagee is concerned, from what it would have been supposing the judgment to which he was not a party was open to objection on some other ground, such as might have been a ground of defence in the action, or which would not have affected the jurisdiction to make it, but only its correctness, as for instance, if a year's rent had not in fact been due. The parties would be bound by such a judgment, though the mortgagee, not being a party, could dispute it. Therefore, taking the decision of the Vice-Chancellor to be correct (and

(1) Batty, 80. (2) 8 Ir. C. L. R. 379.

he did not purport to decide anything beyond the case before him), it does not appear to me to affect the question here in any way. For these reasons I am of opinion that the decision of the Queen's Bench Division and of the Judge at the trial was correct and ought to be affirmed.

FITZGIBBON, L. J.:—

I concur in the judgment of the Lord Chancellor, and will only make some general observations, merely supplementary to the reasons which he has given. The tenancy in all the lands rested on one indivisible contract, and could not be evicted at all, unless it was wholly put an end to. The ejectment relied upon by the defendant was knowingly and deliberately brought for part of the lands only, and I cannot see how it could be made effective at all, by estoppel or otherwise, without violating the principle that a partial eviction is impossible.

The judgments in the Court below rested on different grounds. I understand Madden, J., to have thought that the ejectment was null and void, but that the present plaintiffs were estopped from relying upon its invalidity. The Chief Justice seems to have taken the same view. On the other hand, O'Brien, J., in the Queen's Bench, and the Master of the Rolls here, have treated the defect as an irregularity only, and appear to regard it as being cured by the judgment, at least in the sense that the judgment is operative notwithstanding. I cannot reconcile the latter view with the authorities as to partial eviction, and it is directly opposed to the Vice-Chancellor's opinion, as expressed in *The Land Commission* v. *Doherty* (1).

The position is as follows:—Two distinct denominations of land were included in the same grant, and a single rent issued out of both, which was within the ejectment statutes. The two denominations were occupied by different tenants, but the lessees, by a dealing *inter se*, had made one denomination primarily liable for the entire rent. The whole interest was subject to one mortgage, and as between the landlord and the tenants the rent issued *pari passu* out of all the lands. Under these circumstances

(1) 29 L. R. Ir. 185.

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the landlord first issued a regular writ in ejectment for non-payment of rent, claiming both denominations, but he discontinued that action without serving all the necessary parties. He then instituted another action for recovery of the possession of one denomination only, deliberately omitting the other. Neither the occupiers of the second denomination, nor the mortgagees, were named as defendants, or served with the ejectment. The expression *coram non judice* has been applied both below and here to this proceeding. I think it would be more accurate to say that the necessary subject-matter of a valid ejectment was not brought *coram judice.* The objection is not so much to jurisdiction in the Court as that the subject-matter which the ejectment law and process require to be brought before the Court, for eviction, was not so brought. On the contrary, a partial eviction was knowingly and wilfully attempted for a set purpose, and I do not think that a proceeding so taken, where a statutory procedure is prescribed and has been deliberately departed from, can be regarded as merely irregular, or can be made effectual against anybody by estoppel. No mere amendment could have set the matter right, because if the other denominations had been brought in by amendment, the occupiers of them must have been added and served as defendants, and any amendment which brings in a new subject-matter, and brings in new defendants, is more than the correction of an irregularity, and is tantamount to a new action.

At the same time I do not at all admit that the consequences, which the Master of the Rolls has apprehended, necessarily follow; namely, that the sheriff would be liable as a trespasser, if the judgment for possession of the one denomination only is held to be void as between the parties to the action. An officer acting under a writ good upon the face of it, is often protected, though the proceeding under which the writ issued can be shown *aliunde* to be defective, or to be so far invalid as to confer no right upon a party to what has caused the invalidity. Nor do I admit that a mere error in the parcels would necessarily make an ejectment void.

But, besides general principles, there are specific difficulties which seem to me to show that the present defendant cannot rely on the partial eviction. How could the alleged estoppel be

worked out? What about the mortgage? It has been held by the Vice-Chancellor to be still a valid and subsisting charge on both denominations. His judgment appears to me to be right, and it has not been questioned. The lands of Annagh, the subject-matter of this action, are therefore still vested in the mortgagees, and as against them the judgment in ejectment is null and void. It follows that there is still an operative equity of redemption in these lands, and as the mortgage is redeemable by terminable instalments, the question will ultimately arise—What is to become of the estoppel if the mortgagors redeem, or whenever the last instalment is paid to the Land Commission? Could it be held that the present plaintiffs were estopped from re-entering then, if the Land Commission paid the rent to preserve the mortgaged interest in the meantime?

But again, the estate out of which the rent issues is still subsisting, as to the second denomination, in the tenants of it. How can a tenancy in one part of a leasehold co-exist with an eviction of the reversion in another part? How can the landlord own half a leasehold in possession, while his tenant holds the other half? How can the right to the possession of the lands of Annagh be held to have got out of the present plaintiffs, if it has not got into the present defendant through the ejectment? And yet it is conceded that, *quoad* the mortgage at all events, it has not passed to him. It seems to me that we cannot decide against the plaintiffs, without raising insuperable difficulties, and ignoring the illegality of a partial eviction, which rests upon grounds too high to be affected by mere estoppel.

In holding that the plaintiffs are entitled to the possession, I cannot agree with O'Brien, J., that "reason and justice" are against allowing this action to succeed. "Reason" should rather be against a party who has intentionally departed from the procedure prescribed by statute, and, as regards "justice," it is to be remembered that the land has been occupied by the defendant, and that the interest which he purported to evict was subject to the rent. The amount, therefore, which should have been paid to him out of it, if he had not taken possession of it under the invalid ejectment, or if the premises had been redeemed, ought to have been, and presumably was, taken into account in fixing

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the mesne rates, and thus he loses nothing which in "justice" was his.

Barry, L. J. :—

After the very exhaustive judgments of the Lord Chancellor and FitzGibbon, L.J., I, perhaps, ought not to do more than express my concurrence in the conclusion at which they have arrived, and substantially for the reasons which they have given.

The case is one, in my opinion, of considerable difficulty, and the difficulty is very much enhanced to me by the fact that I differ, not only from the Judges in the Queen's Bench, but also, in this Court, from the Master of the Rolls.

It is to be remembered always—though I think in the discussion it has been somewhat, at times, left out of sight—that this judgment in ejectment for non-payment of rent is altogether a creation of statute, conferring on the Court a jurisdiction purely artificial, but involving the adoption of certain principles of the ordinary law respecting re-entry for breach of condition broken.

Two questions were argued before us—1, Was the judgment in the ejectment of 1883, now relied on by the defendant, absolutely null and void? 2, Whether, even if so void, the plaintiffs, M'Sheffry and Grace Doherty, are not estopped from disputing its validity?

As to the first question, the view which I take is expressed in a few sentences of the judgment of the Vice-Chancellor in *The Irish Land Commission* v. *Doherty* (1). At page 190 he says:—"But the plaintiffs contend that the ejectment for non-payment of rent was incapable of being maintained, and was wholly inoperative and void as regards them; for that the rent in arrear, being issuing out of all Clonmany, an ejectment for non-payment of rent for the recovery of Annagh only would not lie. In reference to this, it is important to note that this was not a case of mistaken action by the plaintiff in ejectment, but was his deliberate act, done in order to extricate himself from the difficulty and inconvenience of proceeding for recovery of the whole lands out of which the rent issued. It was done with full knowledge that his legal remedy was to proceed against the entire holding."

(1) 29 L. R. Ir. 185.

No one can doubt that the plaintiff in that ejectment adopted that course for the deliberate purpose of evading the provisions of the statute which he sought to enforce.

Later in his judgment the Vice-Chancellor says (at p. 194):— "The *habere* must be for putting the landlord into possession of the premises, which *must* mean the premises demised by the lease or other contract of tenancy," and he says at the same page—"Therefore, in my opinion, there is no estoppel under this enactment. The principle of law applicable to such cases is so fully and clearly laid down in *Coneys* v. *Coneys* (1), approved of, as it has been, by Palles, C.B., in *Clanricarde* v. *Clarke* (2) and the authorities so fully considered there, that I need not do more than refer to those decisions. The objection to this judgment is not for irregularity, in which case the only proceeding would be by motion to the Division in which it was entered. It is that the whole proceeding was unfounded in law, and void, and that whatever effect it may have, if any, by way of estoppel upon the parties to it, it cannot affect the title of persons, neither parties nor privies, and that they are entitled to maintain an action, in the nature of a cross-ejectment, to recover the possession, or otherwise enforce their rights, which have not been bound by this void proceeding."

Then comes the question, Is there an estoppel? I am of opinion, with the Lord Chancellor and FitzGibbon, L.J., that there is no estoppel, as a judgment void for want of jurisdiction cannot create an estoppel; and there was, in my opinion, just as much an absence of jurisdiction in this case as in *Coneys* v. *Coneys* (1) (as to which see also *Rowland* v. *Persse* (3), not cited, I think, before us), and as in *Black* v. *Davis* (4). Madden, J., in his judgment in the Queen's Bench Division, admits expressly that the ejectment was null and void, and relies entirely on the estoppel between the parties to it, but, when referring to *Black* v. *Davis* (4) and the other cases, says that no doubt the judgment in ejectment would be conclusive as to the amount of rent being due; but he says that here there is another question, viz. the "identity of the parcels," and he thinks that it would be conclusive as to that.

Admitting that the judgment would be conclusive as to the

(1) 8 Ir. C. L. R. 379.
(2) 26 L. R. Ir. 260.
(3) 11 Ir. C. L. R. 49.
(4) Batty, 80.

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amount of rent (see *per* Bushe, C. J., in *Black* v. *Davis* (1)), it does not in my opinion follow that it is conclusive on every other question necessary to give jurisdiction to the Court. Madden, J., says that this is here a question as to the "identity of the parcels." In my opinion it is not a question of the "identity" of the lands sought to be recovered in the ejectment *with some part* of the lands comprised in the contract of tenancy. The parcels must be identical, in the sense that the ejectment must be brought for all the lands comprised in the contract of tenancy, and if it is not, there is no jurisdiction in the Court to entertain it, and there is, in my opinion, just as fatal a defect in jurisdiction here as there was in *Black* v. *Davis* (1), or *Coneys* v. *Coneys* (2). These cases decide that there must be the relation of landlord and tenant, and the authorities have indisputably decided that the ejectment *must* extend to and comprise all the lands comprised in the instrument sought to be evicted, which is equivalent to saying that the Court has no jurisdiction to entertain a suit for an eviction of part only of the lands so comprised any more than to entertain a suit for all such lands if the relation of landlord and tenant does not exist. The Vice-Chancellor says at p. 194:—"The *habere* must be for putting the landlord into possession of the premises, which must mean the premises demised by the lease or other contract of tenancy. The persons interested are expressly those, and *necessarily all those*, interested in the lease or other contract of tenancy, and the premises which the landlord is thenceforth to hold discharged from such lease or tenancy *are all the premises therein comprised.* In not one of these essential particulars are the words of the statute satisfied by the judgment so obtained."

The matter in my opinion stands thus:—Under the ejectment statutes as interpreted up to this date, to give jurisdiction to the Court it is necessary that, 1, there must be the statutory amount of rent due; 2, there must exist the relation of landlord and tenant; 3, the lands sought to be recovered must be all the lands out of which the rent issued under the contract of tenancy—*Black* v. *Davis* (1), and *Coneys* v. *Coneys* (2), have decided that as to 2 the judgment was not conclusive. I can see no reason on prin-

(1) Batty, 80. (2) 8 Ir. C. L. R. 379.

ciple why it should be conclusive on 3. But as to 1, the question of the amount of rent, it stands on a totally different footing. The statute 4 Geo. 1 requires that even in cases of judgment against the casual ejector, etc., now equivalent (as regards the question before us), to judgment by default, the necessary amount of rent must alone be proved.

I presume this is by reason of its bearing upon the subsequent proceedings which may be taken by payment or lodgment in Court of the amount and costs to relieve the tenant from the forfeiture. And it is in this sense that I think must be interpreted the words of Lord Lifford in *Kenmare* v. *Supple* (1), and of Lord Redesdale in *O'Mahony* v. *Dickson* (2). As regards the amount of rent there is thus as distinct an adjudication that it was due as if an issue on the question had been distinctly knit and tried between the parties, and it would be highly inconvenient if the judgment did not set that question "at rest"; but if the language of Lord Lifford and Lord Redesdale are to be interpreted as conveying that the judgment is conclusive, not only as to the requisite amount of rent being due, but as to the existence of every other requisite necessary to give the Court jurisdiction, the language of the learned Lords is directly inconsistent with *Black* v. *Davis* (3) which has been treated as law since it was decided in 1826. Mr. Justice O'Brien was of opinion that including the lands of Annagh alone in the ejectment was a mere irregularity, and that the relation of landlord and tenant existed sufficiently to prevent the judgment being void. He says:—"How can we determine the point of the difference between an irregularity, which the ejectment for part of course was, and a nullity, otherwise than by reference to the words of the statute? The Act of Parliament says that when a year's rent is in arrear, the landlord shall be entitled to bring an ejectment. The defendant is not less the landlord of Annagh because he is of the other part. The rent is in arrear, for it issues out of these lands as well as the rest, and as between all parties, is payable out of them alone. The conditions of the statute, therefore, are in terms satisfied. The relation of landlord and tenant and the rent in arrear are the foundation of the right. The rest is a matter of irregularity merely."

(1) 1 Vern. & Scr. 1. (2) 2 Sch. & Lef. 412. (3) 8 Ir. C. L. R. 373.

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I cannot say that I am free from doubt on the point, especially having regard to the opinion of Mr. Justice O'Brien in the Queen's Bench Division and the opinion of the Master of the Rolls here; but I cannot hold this judgment to be merely irregular. It is not a question of procedure: it is absolutely a question of jurisdiction. It is not, it could not be, disputed that there cannot be a partial eviction of a lease for non-payment of rent under the ejectment statutes. What is the meaning of this indisputable proposition that the Court has no power to award judgment for such partial eviction? Jurisdiction is defined to be "the extent of power." To say, therefore, that the Court has "no power" is simply to say it has no jurisdiction. It is not a question of Court-made practice; the rule against partial eviction is the result of the inevitable long recognised construction of the ejectment statutes, giving a jurisdiction purely statutory, although based on the common law of entry for condition broken. The anomalous consequences which may arise from permitting partial eviction are amply illustrated by this very case, and render it impossible that the Legislature could ever have contemplated such a state of things. It is said the Court could have amended here; but the necessary amendment would be an entire re-casting of the proceedings, equivalent to a new action, which the plaintiff of 1883 (Edward Doherty) might have brought without any leave of the Court. It is said the nullification of this judgment is a great hardship and injustice to the defendant here. If it be, he has only himself to blame; for the purpose of avoiding the trouble, expense, and, perhaps, delay which a compliance with the requirements of the law would have entailed on him, he wilfully adopted this device of misleading the Court into giving him this judgment which he perfectly well knew he was not entitled to. It is also suggested that if this judgment be held null and void so must any judgment where there has been any omission of any portion, no matter how small, of the premises. I do not feel apprehensive on that point; it has never, so far as appears, arisen since the time of Queen Anne, and if it does arise I cannot doubt that the good sense of a Court and its inherent power over its proceedings will be effectual to remedy an accidental slip, the proceedings being in all other respects *bona fide*, complete, and regular, and no injury

arising to any party from the innocent mistake. But I very much doubt whether any Court would, and I am sure it ought not to, give any aid whatever in the case of a judgment so obtained as the judgment of 1883; and I think to allow a judgment obtained by such means to stand would be to establish a very evil precedent.

I am of opinion that the judgment of 1883, firstly, is null and void; and, secondly, that it creates no estoppel which can sustain it against the plaintiffs here. I think that the proceedings in that action were *coram non judice* as not bringing before the Court the subject-matter, viz. the whole of the lands, upon which alone the Court had power to operate as I have already said. I have arrived at this conclusion with doubt, especially as I am differing in that conclusion in respect of the point of estoppel from the Lord Chief Justice and Mr. Justice Madden, and on the whole case from Mr. Justice O'Brien in the Queen's Bench Division, and the Master of the Rolls in this Court.

There is a view of this case which has not been presented in this Court, or, so far as I can see, in the Queen's Bench Division, but which, if the subject be again discussed, may be deserving of consideration, namely, whether the act of Edward Doherty in obtaining (by the means he adopted) the judgment of 1883 was not illegal as against public policy, being a fraud on the administration of the law and a deception on the Court, to mislead it into awarding a judgment which it had no jurisdiction to award, and to which the plaintiff was not (as he well knew) entitled. If that were so, would the judgment operate as an estoppel even if Grace Doherty and M'Sheffry could be regarded as *participes criminis*? As this view has not been discussed, I give no opinion upon it.

I think the judgment of the Queen's Bench Division should be reversed.

Solicitors for the plaintiffs: *D. Doherty & Co.*
Solicitor for the defendant: *J. Croker.*

R. D. M.

Q. B. Div.
1897.
Feb. 17.

KEENAN *v.* CARSON (1).

(1896. No. 9454.)

Practice—Specially indorsed writ—Ejectment for non-payment of rent by assignee of lessor—R. S. C., Ir., 1891, *Order III., Rule* 6 ; *Order XIV., Rule* 1.

Though the assignee of a lessor will, in Ireland, in an action to recover the demised premises for non-payment of rent, be given liberty to mark judgment summarily upon motion under R. S. C., 1891, Order XIV., Rule 1, on a writ of summons specially indorsed, such liberty will not be granted unless it is stated or shown in the indorsement that the lessor's interest has become vested in the plaintiff, or that otherwise there is a subsisting contract of tenancy between the parties.

Motion for final judgment, pursuant to Order XIV., Rule 1, on a writ of summons indorsed as follows:—"Statement of Claim. The plaintiff's claim is to recover possession of all that and those" [setting out the lands], "held under lease dated 27th July, 1866, from T. K. Lowry and G. Crawford to J. Thompson for a term of twenty-one years, from the 1st May, 1866, or the life and lives of her present Majesty Queen Victoria and H.R.H. George, Duke of Cambridge, and the survivor, situate . . . in the Co. of Monaghan, for non-payment of the rent thereof." The particulars set out an arrear of twelve years' rent, at £12 per annum, and the indorsement was signed by the plaintiff's solicitor.

Ignatius J. O'Brien, for the plaintiff.

A. P. Henry, for the defendant, submitted that the indorsement was insufficient, as it did not show any contract of tenancy between the parties. The lessors were stated to be T. K. Lowry and G. Crawford, and there was not even an averment that their interest had vested in the present plaintiff.

(1) Before Sir Peter O'Brien, L.C.J., and O'Brien, Johnson, and Madden, JJ.

[They referred to *Kane* v. *Brownrigg* (1); *Casey* v. *Hellyer* (2; *Beaufort* v. *Ledwith* (3); *Cullen* v. *Jackson* (4).]

THE COURT intimated that on the previous occasions when it had been necessary in this Division to consider *Casey* v. *Hellyer* (2) the same view had been entertained as was expressed by the Exchequer Division in the case of *Kane* v. *Brownrigg* (1). There, however, the devolution of the plaintiff's title was shown on the writ. Here the writ was silent, and did not state any contract of tenancy between the parties. The motion was refused with costs, leave being given to the plaintiff to amend his statement of claim as advised (5).

Solicitor for the plaintiff: *F. Clinch.*
Solicitor for the defendant: *M. E. Knight.*

A. E. R. J.

(1) [1897] 2 I. R. 55.
(2) 17 Q. B. D. 97.
(3) [1894] 2 I. R. 16.
(4) *Ibid.* 17, n.
(5) Counsel for the plaintiff also urged that the defendant, who had delivered a defence, had, by so doing, waived his right to object to the sufficiency of the indorsement; but as to this see *Annaly* v. *Comyn* (30 L. R. Ir. 102).—[REP.]

Q. B. Dir. 1896.

Dec. 3.

REG. (BRIDGES AND RAM) *v.* JUSTICES OF ARMAGH (1).

Summary jurisdiction—Order—"Dismiss"—Appeal to Quarter Sessions—Game Act (27 *Geo.* 3, *c.* 35, *Ireland*)*—Petty Sessions* (*Ireland*) *Act* (14 *&* 15 *Vict. c.* 93), *s.* 21.

In a prosecution under the Game Act, 27 Geo. 3, c. 35 (Ir.), if the case be dismissed, the Justices' order at Petty Sessions should state whether the dismiss is on the merits or without prejudice, and an order of "Dismissed," simply, is wrong; but the party aggrieved still has his right of appeal therefrom to Quarter Sessions.

In a prosecution for trespass in pursuit of game, the Justices entered their order on the Order Book as "Dismissed," and refused to add "on the merits," or "without prejudice." The prosecutors appealed to Quarter Sessions, and there, at their own request, had the appeal struck out, as being from a bad order and untenable. They subsequently brought a second prosecution in respect of the same offence, and, on the Justices refusing to entertain it, applied for a mandamus to compel them to do so. The Court refused to grant the writ under the circumstances of the case, the prosecutors having had another remedy which they had adopted and then, of their own motion, had abandoned.

MANDAMUS. This was a motion to make absolute a conditional order dated 28th October, 1896, for a writ of mandamus, directed to the Justices of county Armagh, commanding them to enter continuances and to hear and determine, according to law, the matter of a complaint for trespass in pursuit of game (2), at the suit of N. Bridges and S. A. Ram, against T. M'Reynolds and T. M'Court, which had come on for hearing before the Justices at Petty Sessions at Portadown, on the 27th July, 1896.

It appeared that previously, on the 23rd of March, a complaint in respect of the same offence, and similarly framed, had come on for hearing at Portadown Petty Sessions before the resident magistrate (T. D. Gibson) and other Justices, when evidence was given on behalf of the complainants that the defendants were seen on

(1) Before O'BRIEN and JOHNSON, JJ. (2) 27 Geo. 3, c. 35, s. 10.

the day in question on these lands with greyhounds and terriers in search of game; that there was game on the lands, and that the defendants were not authorised to hunt there. The defendant M'Court did not appear, but M'Reynolds appeared by his solicitor, and contended that the complainants should prove their title and the reservation to them of the game on the lands, or that the tenant in occupation should have been joined as a complainant. The Justices retired to consider the matter, and returning, the Chairman, the resident magistrate, announced that the case was "dismissed." The complainants' solicitor objected to this form of order, referring to *Great Southern and Western Railway Company* v. *Darby* (1), and asked for a "D. O. M.," or a "D. W. P." The Chairman, however, refused to make any change, the entry made in the order book being "dismissed," simply. The complainants' solicitor served notice of appeal, and, when the case came on before his Honour Judge Kisbey, thought it his duty to refer the learned Chairman to the decision above cited, whereupon the appeal was "struck out" as not being from a legal order. Subsequently a second complaint, the subject of the present motion, was served upon the same defendants in respect of the same offence. This came on for hearing on the 27th July, before the same resident magistrate and other Justices. When the case was opened the Justices retired to consider the course they would adopt, and, on their return, the Chairman stated that they had decided not to go again into the case, but would make the following order, which was accordingly entered:—"This complaint having been already heard and adjudicated upon, and an order of dismissal entered . . . and further, an appeal having been lodged and called for hearing at Lurgan Quarter Sessions . . . and struck out . . . this Court now orders that it has no power a second time to hear the complaint, the first order having been untouched on the said appeal and still existing."

The above statement is taken from the affidavit of the complainants' solicitor. Affidavits were filed as cause, alleging that on the cross-examination of the complainants' witnesses on the hearing of the first summons there was amply sufficient evidence to disprove

(1) 27 Ir. L. T. R. 45.

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the charge or at least to entitle the defendants to a dismissal, and stating that on the appeal to the Quarter Sessions, where both defendants were represented, the complainants' solicitor, after pointing out the difficulty which he felt in appealing from an order which he said was a nullity, asked in the first instance for leave to withdraw; that the defendants' solicitor, without admitting the validity or invalidity of the Justices' order or the possibility of appeal therefrom, objected to this, and that the Chairman then acceded to the request of the solicitor for the complainants that the case should be struck out.

J. H. Campbell, Q.C. (*J. Chambers*, with him), for the applicants, the complainants in the Court below, relied on the *Great Southern and Western Railway Company* v. *Darby* (1), and *Ex parte Conybeare* (2); they argued that the first order of the Justices (23rd March, 1896) was a nullity, made in direct disobedience to the provision of the Petty Sessions Act (3), and consequently was no bar to a second prosecution for the same offence. The Justices had unjustifiably declined jurisdiction, and the order for a writ of mandamus should therefore be made absolute. The evidence given on the occasion of the former prosecution clearly showed that the defendants were guilty of the offence, and unless the Court interfered the prosecutors would be without remedy, as no appeal lay unless from a valid order.

O'Shaughnessy, Q.C., and *W. H. Brown*, for the defendants, contended that the order of the 23rd March, 1896, was good, being made not under the Petty Sessions Act, but under 27 Geo. 3, c. 35. Even, however, assuming that it should have taken the form pre-

(1) 27 Ir. L. T. R. 45. (2) Cases under Crimes Act, 1887, p. 327.

(3) The Petty Sessions (Ireland) Act (14 & 15 Vict. c. 93), section 21, provides that "in all cases of summary jurisdiction the Justices . . . shall either make such order as shall be authorised by the Act under which the complaint shall be made, or shall dismiss the complaint either upon the merits or without prejudice to its being again made, and the entry of the order so made shall be as follows—1. One of the Justices then present shall thereupon, or cause the clerk to, enter the particulars of such case" in the Order Book, "according to the form D, and shall, in case of a dismissal, state whether the same is upon the merits or without prejudice to a further complaint. . . ."

scribed by the Petty Sessions Act, still it was open to the prosecutors to appeal therefrom. This right of appeal was conferred by the Game Act under which the complaint was brought (1). The prosecutors had adopted that course, and it was of their own motion that the remedy by appeal was abandoned. Under these circumstances they could not apply to this Court for a writ of mandamus. Apart from the question of the propriety of the form of order adopted, the Justices were fully justified in refusing on the facts before them to convict the defendants on the first occasion, and on the second occasion in refusing to entertain the complaint anew.

J. Chambers, in reply.

O'BRIEN, J. :—

This was an application for a mandamus to Justices to require them to hear a complaint. A summons was issued in the first instance against the defendants for trespass in pursuit of game, under the Irish Statute of 27 Geo. 3, c. 37, which is still the law in such cases, and under which an appeal lies to either party for any wrong done by the Justices. This was dismissed. The magistrates were asked to state whether the dismiss was on the merits or without prejudice, but refused to do so. In this they were clearly wrong. The Petty Sessions Act expressly requires them to state, in the order, whether the dismiss is on the merits or without prejudice, and it is curious they should have overlooked the direction in the margin of the common form of order to that effect, unless it be that they conceived that, the proceeding being under a statute passed at a time when the distinction had no existence—for I believe it came into summary jurisdiction from the civil bill code—it was sufficient to follow the words of the statute. The

(1) 27 Geo. 3, c. 23, sect. 23, provides "that if any person shall think him or herself aggrieved by anything done in pursuance of the laws relative to the game by any Justice of the Peace, such person may appeal to the next general sessions for the said county where the cause of complaint shall arise, who are hereby authorised and required to hear and determine the same, . . . such person appealing having first entered into recognizance . . . conditioned to try such appeal, and abide the order of, and to pay such costs as shall be awarded by, the said Justices."

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procedure is regulated by the Petty Sessions Act, and this was a matter of procedure in which they were bound to follow it. The prosecutors, however, by their local agent, appealed from the order as it stood and gave security by recognisance. When the case came before the Quarter Sessions, the agent informed the Chairman that there was a defect in the order and applied to withdraw the appeal. The solicitor for the defendants, on the other hand, opposed the application to withdraw and pressed to have the appeal heard. Ultimately it was "struck out," and then the prosecutors' agent issued a fresh summons, complaining of the same trespass, and went before the magistrates and insisted upon its being heard, contending that the former order was a nullity and no bar to another complaint. The magistrates declined to entertain the case, and a carefully prepared memorandum was put upon the book, signed by the resident magistrate, stating, as the ground, the former order, the appeal, and its result, and suggesting therefore that the first order was undisposed of. Under these circumstances the Court is required to interfere. Now it would occur to us that, as regards the right to appeal, the first order, though not complying with the Act, was not a nullity, and that under the authority "to confirm, vary, or reverse," it was competent to the Quarter Sessions to entertain it. Whatever kind of dismiss it was, it was a wrong which was the subject of appeal, and appeal was only under the statute of Geo. 3. Suppose the case therefore where an appeal is legally taken and the party appealing declines to proceed: in the ordinary course he would be taken as having abandoned his appeal. This case is therefore that there was a good order for the purpose of an appeal, and was so used, and the prosecutor by his own act wants to remit it to its first infirmity in order to remove it out of the way of a new prosecution. It is of course always open to a person to vacate his own proceeding, on the terms of costs, for which the recognisance in this case would be a provision, but the effect of vacating the appeal cannot extend to vacating the first order, which, if irregular and capable of being questioned on *certiorari*, is still not a nullity, and the case therefore comes under the rule applicable to mandamus that the party had another remedy, without a second prosecution, which he took but did not proceed with. If this were an instance of a

permanent and substantial right, or if, no matter how trivial it was, the magistrates had persisted in violating the statute, we might consider it our duty to put the first order out of the way; but it is a mere trespass of a trifling kind, for which if renewed a new complaint can be brought. We cannot therefore make the order absolute for a mandamus. Both parties will have to abide their own costs.

JOHNSON, J., concurred.

Solicitors for applicants: *Carleton & Co.*
Solicitor for defendants: *N. M. Brown.*

A. E. R. J.

WHYTE *v.* NUTTING (1).

(1896. No. 625.)

Sheriff—Fi. fa.—*Postponement of sale—Solicitor for execution creditor—Managing clerk—Authority.*

Although an execution creditor or his solicitor, after delivery of the writ to the sheriff, may withdraw the execution, or postpone the sale of chattels seized under it, there is no implied power in the managing clerk of the solicitor to do so, notwithstanding that the clerk is left in charge of the solicitor's office and professional business during the temporary absence of his employer.

Accordingly where, during the absence from Ireland of the solicitor for an execution creditor, the managing clerk of the creditor's solicitor, who was in charge of his office and business, required (without being expressly so authorized) the sheriff to postpone for two days the sale of goods seized under a writ of *fi. fa.*, and the sheriff refused to do so:—

Held, that the execution debtor could not sustain an action against the sheriff for illegally proceeding with the sale.

NEW TRIAL MOTION.

The action was brought to recover damages against the High Sheriff of the county of Dublin, and was tried before Mr. Justice Holmes and a jury in the Trinity Sittings, 1896. The statement

(1) Before ANDREWS and MURPHY, JJ.

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of claim contained three causes of action: 1, for wrongfully breaking outer doors in executing a *fi. fa.*; 2, for negligent and improper conduct of the sale; and, 3, for illegally proceeding with the sale after the judgment creditor had required that it should be adjourned. There was no evidence in support of the first cause of action; the jury found a verdict for the defendant on the second; and the learned Judge directed a verdict for him on the third, and entered judgment for him. The plaintiff moved to set aside the verdict and judgment so directed as aforesaid, and for a new trial.

The material facts of the case are fully set out in the judgment of Mr. Justice Andrews.

Houston, Q.C. (with him, *Rosenthal*), for the plaintiff.

Campbell, Q.C., (with him, *P. Keogh*), for the defendant.

The authorities cited on both sides mainly dealt with the question of the power of the solicitor for the judgment creditor, or his managing clerk, to require the sheriff to adjourn the sale, and were as follows: *Withers* v. *Henley* (1); *Hunt* v. *Hooper* (2); *Barker* v. *St. Quintin* (3); *Sneary* v. *Abdy* (4); *Re Craycraft* (5); *Rooney* v. *Farrell* (6); *Sheriff of Louth* v. *Donogh* (7); *Kempland* v. *Macauley* (8); *Botten* v. *Tomlinson* (9); *Raphael* v. *Goodman* (10); *Gregory* v. *Cotterell* (11); *Smart* v. *Hutton* (12); *Re Bryant* (13); *Lovegrove* v. *White* (14); *Levi* v. *Abbott* (15); *Taylor* v. *Willans* (16); *Standage* v. *Creighton* (17); *Baker* v. *Black* (18); Churchill on Sheriffs, p. 439; Cordery on Solicitors, p. 219; and Wylie's Jud. Acts, p. 1252.

Cur. adv. vult.

(1) Cro. Jac. 379.
(2) 12 M. & W. 664.
(3) *Ibid.* 441.
(4) 1 Ex. D. 299.
(5) 8 Ch. D. 596.
(6) Ir. R. 5 C. L. 377.
(7) 18 Ir. L. T. R. 36.
(8) Peake's N. P. C. 95.
(9) 16 L. J. C. P. (N. S.) 138.
(10) 8 A. & E. 565.
(11) 5 Ell. & Bl. 571.
(12) 8 A. & E. 568.
(13) 4 Ch. D. 98.
(14) L. R. 6 C. P. 440.
(15) 4 Exch. 588.
(16) 2 B. & Ad. 845, 856.
(17) 5 C. & P. 406.
(18) 8 L. T. 393.

ANDREWS, J. :—

This was a motion on behalf of the plaintiff to set aside the verdict and judgment directed to be entered for the defendant (the High Sheriff of the county of Dublin) and for a new trial.

There were three causes of action in the statement of claim: 1, for breaking outer doors in executing a *fieri facias*; 2, for negligent and improper conduct of the sale; and, 3, for illegally proceeding with the sale after the judgment creditor had required that it should be adjourned. There was no evidence in support of the first cause of action; on the second the jury found for the defendant; and on the third cause of action, which is the only one to be now considered, the learned Judge at the trial directed a verdict for the defendant.

The material facts of the case were that two ladies named Kirwan obtained a judgment in debt against the present plaintiff on foot of which a writ of *fi. fa.* was issued and lodged with the sheriff (the present defendant) for execution, in pursuance of which he seized the goods of the present plaintiff, Whyte, and duly advertised the sale for a specified day (which was a Saturday in the middle of August) at the hour of 1 o'clock. The solicitors for the judgment creditor were Messrs. Hogan & Son, and at the time appointed for the sale, which was in the Long Vacation, one of the two partners who constituted that firm was in England, and the other was out of Dublin; and during their absence the management of the business relating to the execution was left in the hands of their managing clerk, a person named Bennett. It appears that on the Saturday upon which the sale was to take place, Whyte and his solicitor went to Bennett and made a communication to him with reference to the impending sale; and it may be inferred that Whyte's object was to obtain a postponement of the sale in the hope or anticipation of some settlement being come to. Whyte and Bennett therefore went to Whyte's place near Dublin where the seizure had been made and where the sale was to take place, and saw Furlong, the sheriff's bailiff, who was also to act as the auctioneer. This was a very short time before 1 o'clock. Bennett called on Furlong to postpone the sale until the following Tuesday, representing himself as acting for the execution creditors; and upon Furlong stating that he did not know him, Bennett was

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identified by another bailiff as the clerk of Messrs. Hogan & Son. After some demur on the part of Furlong, and some discussion about guaranteeing the sheriff's expenses and fees, Furlong eventually consented to adjourn the sale until the following Tuesday, and announced that it was so adjourned. A few of those present left. Amongst those who remained, some one said that the sale might as well go on then as be adjourned until Tuesday. After some further conversation Furlong decided to go on with the sale, and announced that it would then proceed, and he accordingly proceeded with the sale.

Upon the evidence at the trial the jury found that the sheriff had not conducted himself negligently or "improperly" in and about the sale, and thereupon the learned Judge directed a verdict and gave judgment for the defendant on all the causes of action.

The only question which, having regard to the view we take, it is necessary for us to decide, is whether the sheriff was bound under the circumstances to adjourn the sale, or was justified in proceeding with it? That question turns on whether Bennett as managing clerk of Messrs. Hogan & Son had implied authority from having been left in charge of the business of the execution, to require the sheriff to postpone the sale. The learned Judge reports that he told the jury that as he understood the law a judgment creditor who had given an execution to the sheriff had no right to interfere with the sale by adjourning it or otherwise. If this were to be taken literally I would be unable to agree with it; as, in my opinion, the judgment creditor or his solicitor in charge of the execution has power to require the sheriff to postpone the sale. In the case of *Levi* v. *Abbott* (1) it was held that the attorney in the action had the power to direct and manage the execution against the goods, and might order the sheriff to withdraw after the seizure, and give up the goods, and circumstances might arise which would make the adjournment of the sale a reasonable and proper proceeding; but, in my opinion, the adjournment should be required to be made in such a way as in effect to amount to a withdrawal of the writ. This effect it would have in almost every case, for this reason, that where the sheriff is authoritatively

(1) 4 Exch. 588.

required to adjourn the sale the writ ceases to be in his hands to be executed. On this I may refer to the case of *Hunt* v. *Hooper* (1) in which a notice to the sheriff who had seized, not to execute the writ until further order, was held equivalent to a withdrawal of the writ.

From the sentence in the learned Judge's report, which follows that portion of his charge which I have referred to, I think what he really meant was that the sheriff, when required to adjourn the sale, must be put in the position he would be in if the writ were withdrawn, a position in which, I think, almost every authorised adjournment would place him. But what the learned Judge really decided as the basis of his direction for the defendant was, as appears from his report, that there was no authority for the proposition (which he wholly dissented from) that a judgment debtor had a right of action against a sheriff, because a sheriff's sale was not adjourned for two days at the request of a clerk from the office of the solicitor for the judgment creditor, made five minutes before the advertised time of sale, the execution not having been withdrawn. There was no evidence in the case that Bennett had any express authority, either from the judgment creditors or their solicitors, Messrs. Hogan & Son, to require the sale to be adjourned, and accordingly it was not argued before us that he had such authority by implication. Now it is not the law that a solicitor's clerk, left by his principal in management of a case, whether proceeding in Court or proceeding after judgment to execution, has implied power to do everything that the solicitor himself has power to do. A client who retains a solicitor is entitled to the skill and judgment of his solicitor in the conduct of the business he is entrusted with, and is not bound to be satisfied with the skill and judgment of the solicitor's clerk.

A passage was cited from Lord Tenterden's judgment in the case of *Taylor* v. *Willans* (2), in which he is reported to have said:—"If an attorney leaves the conduct of a cause to his clerk, what the latter does therein binds the party, as much as the act of the attorney himself." This proposition cannot be accepted in

(1) 12 M. & W. 664. (2) 2 B. & Ad. 856.

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the wide terms of these words taken alone. They must be read with reference to the subject of the judgment. That case was an action of malicious prosecution, and at the trial an affidavit, made by the clerk of the attorney for the prosecutor in the course of the prosecution, was admitted in evidence, and held to have been rightly admitted, not as proof of the facts therein stated, but as showing a step taken by those who acted in the prosecution. Nor can any such general proposition be to any extent supported by what was said at Nisi Prius in the case of *Standage* v. *Creighton* (1), to which we were referred. A passage was cited from Cordery on Solicitors to the effect that a managing clerk in charge of an action had power to arrange it, and as an authority for this not very precise proposition a case of *Baker* v. *Black* (2) is referred to in a note. This case appears to have been reported only in the 8th volume of the old series of the *Law Times*. Counsel had not been able to obtain this volume at the argument, but I have since obtained it, and read the report, and I venture to think that the case was not worth reporting, and that it describes nothing to the purpose. It was heard in the Court of Exchequer in England in 1847, and it appears from the report that the plaintiff's attorney being ill, and unable to attend, the conduct of the action had devolved on his clerk. Just before the case was called on, the clerk arranged with the opposite side that the record should be withdrawn, the defendant to consent to a Judge's order for payment of the plaintiff's taxed costs, without the debt, within six months, otherwise judgment for the plaintiff. This arrangement was communicated to and concurred in by counsel on both sides, and the record was withdrawn, no Judge's order as to the costs was drawn up. Afterwards a rule *nisi* was obtained on behalf of the plaintiff to set the arrangement aside, and on cause shown the rule was made absolute on payment of the costs of the day and of the application. No case was cited during the argument. It was said in argument, on one side, that it would be very inconvenient if such an arrangement by a managing clerk should be held not to bind the client, having regard to the large number of cases which managing clerks had

(1) 5 C. & P. 406. (2) 8 L. T. 393.

charge of; and, on the other side, that the case in question had been mismanaged, and was a hard case. Pollock, C. B., in announcing the decision of the Court seems to have been of opinion that what the counsel had agreed on ought to have been regarded as binding unless there was fraud or misrepresentation, neither of which was imputed, but what the Court actually did was to set the arrangement aside.

I agree with the learned Judge, who tried the present case, that Bennett the clerk cannot be held to have had any implied authority to require the sheriff to postpone the sale, a step which, if taken, might have seriously affected the interests of the execution creditors, and might possibly have let some other execution gain priority to theirs. It never has been held that a solicitor's clerk has such an implied authority, and, in my opinion, it would be very unsafe to hold that he has.

We were asked, during the argument, to grant a new trial in the event of our holding, as we do on this question of authority. The object of asking for a new trial was with a view to endeavour to prove some express authority given to Bennett. It would not be in accordance with the principles on which applications for new trials are determined to grant a new trial for such a purpose. There would be obvious danger in taking such a course.

If Bennett had the requisite express authority it should have been proved at the trial. If he had not, it would be idle or dangerous to grant a new trial; and even up to the conclusion of the argument the plaintiff's counsel were not instructed, and were unable to say, whether any proof of express authority to Bennett could be given, which the dates and circumstances of the case appear to make it very improbable that he could have had.

We, therefore, must refuse the motion to set aside the verdict with costs.

MURPHY, J., concurred.

Solicitor for the plaintiff: *J. D. Rosenthal.*
Solicitor for the defendant: *H. F. Martley.*

J. P. B.

Ex. Div. (*Revenue Side.*) 1896. Nov. 12, 13.

LAWLESS, Appellant; M'ALEER, Respondent (1).

Revenue prosecution—Illicit distillation—1 & 2 Wm. 4, c. 55, ss. 23, 49—Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), ss. 21, 24, 42—20 & 21 Vict. c. 40, s. 6—21 & 22 Vict. c. 100, s. 140, Sched. C—Stamp—Dismiss without prejudice—Appeal—Notice.

The respondent was prosecuted at Petty Sessions on the 20th December, 1895, for having in his dwellinghouse spirits illegally distilled, whereon duty had not been paid. The Justices dismissed the case without prejudice. The respondent was afterwards summoned for having illicit spirits in his possession. On the hearing of this summons on the 15th May, 1896, the respondent objected *inter alia* that the summons was not stamped as required by 21 & 22 Vict. c. 100, sched. C, and the Justices dismissed the summons without prejudice. The prosecutor appealed. The notice of appeal was served on the Justices on the said 15th May, 1896, but the respondent having disappeared and his house being shut up, the prosecutor was unable to serve him with notice of the appeal, but posted the notice on the respondent's house on the 16th May, 1896, and lodged the notice on the same day with the Clerk of the Peace. Upon the hearing of the appeal the respondent was convicted and fined £6. On motion for a writ of *certiorari* to quash the conviction :—

Held, 1, that, irrespective of the question whether a stamp was necessary upon a summons in a Revenue prosecution, the absence of a stamp did not, having regard to the 16th section of the statute 20 & 21 Vict. c. 100, deprive the Justices of jurisdiction to entertain and proceed with the case.

2. That an appeal lay from the order of the Justices dismissing the complaint.

3. That the service of notice of the appeal was sufficient.

4. That the "dismiss without prejudice" on the 20th December, 1895, was an authorised order, and that therefore, even assuming the causes of complaint to have been identical, it was no bar to the subsequent prosecution in 1896.

Cause shown against making absolute a conditional order for a writ of *certiorari* to quash a conviction made by the Chairman and Justices sitting at Quarter Sessions at Omagh, in and for the county of Tyrone, on the 24th June, 1896, whereby the above-named respondent was convicted and fined in the sum of £6,

(1) Before Andrews and Murphy, JJ.

with costs, on the hearing of a charge for having in his dwelling-house a quantity of spirits illegally distilled, whereon the duties had not been fully paid, contrary to the statute 1 & 2 Wm. 4, c. 55.

The application for the conditional order was grounded on the affidavit of the respondent's solicitor, who deposed that on 20th December, 1895, he attended the Petty Sessions at Donemona in the said county on behalf of the respondent, on the hearing of a charge at the suit of the appellant for having in his dwelling-house a quantity of spirits illegally distilled, whereon the duties had not been fully paid, contrary to the statute 1 & 2 Wm. 4, c. 55; and also on the hearing of a charge at the suit of the same appellant against the said respondent and his wife Catherine M'Aleer for obstructing and hindering Constable James M'Lain, under the 17th sect. of the same statute. On the hearing of those charges he (deponent) objected to Head Constable Knox conducting the cases in the absence of complainant, but the magistrates decided to hear the cases; that Constables Hughes and M'Lain were examined, and he (deponent) contended that there was no evidence of knowledge on the part of the defendant to support the case of having spirits in his possession, and referred the Court to the case of *Doherty, Appellant, M'Clelland, Respondent* (1); the Justices dismissed both cases, adding in their orders after the word "dismissed" the words "without prejudice," and from these dismissals no appeal was taken by the complainant. That on 7th January, 1896, new summonses were issued for the same offences, with a slight variation in the one charging the defendant with having the illicit spirits in his possession, and when after an adjournment the cases came on for hearing, the solicitor for the complainant contended that the hearing on 20th December, 1895, was a dismiss without prejudice, and that the Petty Sessions Act applied, and cited the case of the *G. S. & W. Railway Company* v. *Darby* (2) as an authority, but the Justices struck out the summonses. That new summonses were again issued for the 17th April, 1896, when the solicitor for the complainant again attended, and again argued that the dismissals of 20th December, 1895, were no bar to future

(1) 28 L. R. Ir. 168. (2) 27 Ir. L. T. R. 45.

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proceedings, and stated that he advisedly brought the summonses under the Petty Sessions Act, and in support of his contention referred to the "proceedings" in sect. 6 of 20 & 21 Vict. c. 40. The said two summonses were served only one clear day before the hearing, and he (deponent) contended that they should be served not less than six days before the hearing in pursuance of sect. 32 of 1 & 2 Wm. 4, c. 55, and after some further argument the summonses were again struck out. For the same offence summonses were again issued for 15th May, 1896, and on the hearing the solicitor for the prosecution contended that the Petty Sessions Act applied, and deponent argued that if so the summonses should be stamped in pursuance of 21 & 22 Vict c. 100, schedule C. On the suggestion of the solicitor for the prosecution the magistrates dismissed both summonses without prejudice, so as to give the prosecution a right of appeal. On the 24th June, 1896, the said two appeals came on for hearing before the Chairman and Justices sitting at Quarter Sessions, and on such hearing the said orders of the magistrates were reversed, and penalties of £6 inflicted in each case; and on the hearing of the said appeals it was admitted by the solicitor for the prosecution that the charges were the same as those adjudicated upon on 20th December, 1895, and that no appeals were then taken. There was no evidence of knowledge on the part of the defendant, because he (deponent) asked Constable Hughes (who found in the cupboard the bottle containing about a quarter of a glass of alleged spirits) if same might be then unknown to the defendant, and he replied, "he did not know," and he referred the Court to *Doherty, Appellant; M'Clelland, Respondent* (1) on that point, and he contended that the hearing on 20th December, 1895, was a final adjudication, and that the Petty Sessions Act had no application to such cases.

In answer to the above affidavit, and the conditional order, the prosecutor (Lawless) filed an affidavit stating his intention to show cause against the said conditional order being made absolute.

The solicitor for the prosecutor (Mr. Dickie) also filed an affidavit, wherein he denied that on the hearing of the said appeals he had admitted that the charges were the same as

(1) 28 L. R. Ir. 168.

those adjudicated upon on the 20th December, 1895, but said that some of the charges were different, and brought under a different section of the 1 & 2 Wm. 4, c. 55, and all were differently worded. One of the summonses of the 5th May, 1896, was brought under the 23rd section in consequence of the dismiss without prejudice of the summonses heard on 20th December, 1895, and brought apparently under the 17th and 22nd sections, but none of those summonses were in accordance with the forms given in the schedule to that Act, and none of them were under the 23rd section at all. He denied that there was no evidence given on the hearing of the appeals of knowledge on the part of the defendant. Deponent was present and heard it proved in Court by Constables Mulloch, Hughes, M'Lain, and Horan, that on 16th November, 1895, they went to the defendant's house and were refused admittance; that when defendant was informed that the police were at his door he was observed by Constable Hughes through the window to jump out of bed and to run across the room, and lift a gallon jar, and that Constables Mulloch and M'Lain having forced open the door, they saw him pouring spirits from the gallon jar on the kitchen fire, nearly setting fire to the house, that he broke the jar on the grate, and tried in other ways to destroy all the contents of it: that the said constables, after a violent struggle with him, secured portions of the broken jar, and were thus enabled, as well as by the smell of the burning spirits to know and prove in Court it was illicit spirits that was poured on the fire; and while the constables were endeavouring to secure the quantity of spirits they were assaulted by the defendant and his wife. The said constables also proved that in a cupboard in the house they found a small quantity of illicit spirits in a bottle.

The defendant then moved to make absolute the conditional order notwithstanding cause shown.

It appeared that the notices of appeal from the order of the 15th May, 1896, were served on the Justices on the same day. The respondent had disappeared, and his house was shut up, and on the 16th May, 1896, the notices of appeal were posted on his house, and lodged with the Clerk of the Peace.

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Wylie, Q. C. (with him *Gallagher*), in support of the application:—

There are four objections to the conviction:—(1) The procedure adopted is that provided by the Petty Sessions (Ireland), Act, 1851 (14 & 15 Vict., c. 93); that being so, the summons should have been stamped in accordance with the Petty Sessions Clerks (Ireland) Act, 1858 (21 & 22 Vict. c. 100, s. 14, and schedule C); (2) No appeal lay from the order of the Justices at Petty Sessions, dismissing the complaint without prejudice; such an appeal is precluded by sect. 24 of the Petty Sessions Act, 1851, which enables only the party against whom the order is made to appeal against the order. By 20 & 21 Vict., c. 40, sect. 6, it is provided that all proceedings under 1 & 2 Wm. 4, c. 55 (under the 23rd section of which the charge was brought) shall be conducted as by the said Petty Sessions Act is directed. That section was explained by 24 & 25 Vict. c. 91, s. 18. (3) Sect. 19 of 24 & 25 Vict. c. 91, provides that any officer or constable or any person against whom any such information, complaint, or proceeding shall have been exhibited or taken, who shall feel aggrieved by the judgment given thereon, may appeal therefrom to the Quarter Sessions of the Peace for the division in which such judgment so appealed against shall have been given next after the expiration of twenty days from the giving of such judgment, upon giving such notices, etc., as are prescribed with reference thereto in 7 & 8 Geo. 4, c. 53, 4 & 5 Wm. 4, c. 51, and 4 Vict. c. 20. Sect. 83 of 7 & 8 Geo. 4, c. 53, provides:—"That no such appeal as aforesaid shall be allowed unless the party or parties appellant shall at and immediately upon the giving of the judgment appealed against, give notice in writing of such appeal to the Commissioners of Excise or Justices of the Peace, respectively, from whose judgment such appeal shall be made, and also the adverse party or parties on such appeal, and shall lodge such notice at the office or with the Registrar of the Commissioner of Appeal, or with the Clerk of the Peace for the Justices of the Peace at such General Quarter Sessions as aforesaid, respectively, by and before whom such appeal is to be finally adjudged and determined; and no such appeal, as aforesaid, shall be heard unless the party or parties appellant on such appeal shall within

one week at least before such appeal is to be finally adjudged and determined give notice in writing to the adverse party or parties on such appeal of the time and place where such appeal is to be heard." The notices were not served in accordance with that section. (4) The order made on the 20th December, 1895, was a dismiss without prejudice, which was an unauthorised order, and did not apply in Revenue cases, and such dismiss must be treated as a dismiss on the merits, which not being appealed from, was a final adjudication. [Counsel cited *Reg.* v. *Unkles* (1), and *Doherty, Appellant; M'Clelland, Respondent* (2).]

The Solicitor-General (with him *C. E. Mac Dermot*), for the prosecutor:—

As to the 1st objection that the summons was not stamped in accordance with 21 & 22 Vict. c. 100, sect. 14, and schedule C, the objection does not go to the jurisdiction of the Justices, and that is shown by reference to the other sections of the Act. By sect. 2 the Petty Sessions Act is incorporated therewith. Sect. 16 empowers the Justices to enforce the payment of fees denoted by stamps, showing that the Justices have, nevertheless, power to hear the complaint. Also sect. 25 contains provision as to making allowance for stamps cancelled.

As to the 2nd objection, the prosecution was brought under 1 & 2 Wm. 4, c. 55, sect. 23; and, no doubt, an appeal was precluded by sect. 49 thereof. But 20 & 21 Vict. c. 40, sect. 6, provided that all proceedings under 1 & 2 Wm. 4, c. 55, should be conducted as by the Petty Sessions Act was provided; and under the 21st sect. of that Act, the dismiss without prejudice was a valid order. Then a right of appeal was conferred on the complainant by 24 & 25 Vict. c. 91, sect. 19.

As to the 3rd objection, the service and lodgment of the notices of appeal required by 7 & 8 Geo. 4, c. 53, sect. 83, was sufficiently effected in compliance with that section; and all reasonable expedition was used in effecting the service and lodgment. [Counsel cited *Christie* v. *Richardson* (3), Bell on Excise, p. 77, and Trotter on Appeals, p. 28.]

As to the 4th objection, the former dismiss was no bar to the

(1) Ir. R. 8 C. L. 50. (2) 28 L. R. Ir. 168. (3) 10 M. & W. 688.

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present proceedings. The respective charges were made under different sections of the Act: not merely that, but the dismiss without prejudice was a valid order, and would not preclude a a second complaint, even though identical with the first.

Nov. 13.

ANDREWS, J.:—

This case comes before the Court on the Revenue side on cause shown against making absolute a conditional order for a writ of *certiorari* to bring up to be quashed an order made at Quarter Sessions reversing a dismiss without prejudice given at Petty Sessions and convicting and fining the defendant in the mitigated penalty of £6.

The 42nd sect. of the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), provided that nothing in that Act should extend to proceedings in *inter alia* Revenue cases, "except that all proceedings as to the same may be in the forms of procedure required by this Act, or as near thereto as the circumstances of the case will admit."

The form of procedure adopted in this case was in accordance with the procedure required by the Petty Sessions Act, and the complaint in the summons, which is dated the 5th May, 1896, is described in the following terms:—

"This is a complaint under the 23rd sect. of the Illicit Distillation Act of 1831 (1 & 2 Wm. 4, c. 55)."

The first objection to the conviction is that as the form of procedure adopted was that required by the Petty Sessions Act of 1851, the Petty Sessions Clerks (Ireland) Act, 1858 (21 & 22 Vict. c. 100), applied, and that the summons was not stamped as required by sect. 14 of that Act, and schedule C therein referred to. In my opinion this objection does not go to the jurisdiction, even assuming that the 14th sect. is obligatory on the prosecutor in a Revenue prosecution, which, I think, may well be doubted. The 16th section empowers the Justices at Petty Sessions to make a summary order for the payment of the fees denoted by the stamps specified in schedule C, and that section in my opinion shows that the absence of a stamp does not deprive the Justices of jurisdiction to proceed, and that they may proceed to hear the complaint, having a summary power conferred on them to enforce

payment of the fee by the person liable to pay it. It is also to be observed that provision is made by the 25th section that in Crown prosecutions where fees for stamps have been paid, and have not been recovered as costs of the prosecution, allowances are to be made in respect of them by cancelling the old stamps, and issuing fresh stamps in lieu of them. In my opinion the first objection to the conviction fails.

The second objection to the conviction is that as the form of procedure under the Petty Sessions Act was adopted, no appeal lay from the order of the Justices at Petty Sessions dismissing the complaint, such appeal being excluded by the 24th section of the Petty Sessions Act.

With respect to this objection, the 49th sect. of 1 & 2 Wm. 4, c. 55 (under the 23rd sect. of which the prosecution was brought), expressly enacted that there should be no appeal against any judgment, or conviction, or proceedings of any Justice or Justices under that Act. Then came the Illicit Distillation (Ireland) Act of 1857 (20 & 21 Vict. c. 40), the 6th sect. of which enacted that all proceedings under 1 & 2 Wm. 4, c. 55, should be conducted as by the Petty Sessions (Ireland) Act, 1851, was directed and provided, and after this enactment it is clear that, whatever it might have been but for that Act, the dismiss without prejudice given at Petty Sessions in this case was in form a good order (14 & 15 Vict. c. 93, s. 21). Next came the Act of 1861, amending the laws relating to the Inland Revenue (24 & 25 Vict. c. 91), the 19th sect. of which gave an appeal to Quarter Sessions by either the complainant or the defendant in proceedings (*inter alia*) under 1 & 2 Wm. 4, c. 55, against the judgment given thereon, upon giving such notices and upon such terms as were prescribed in cases of appeals by (*inter alia*) the Act 7 & 8 Geo. 4, c. 53. The second objection, that no appeal lay from the order of the Justices at Petty Sessions dismissing the complaint therefore also fails.

The third objection to the conviction is that the notices of the appeal so required to be given were not given. The 83rd sect. of the 7 & 8 Geo. 4, c. 53, requires that in a case like the present the appellant shall "at and immediately upon the giving of the judgment appealed against," give notice in writing of the appeal

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(1) to the Justices; (2) to the adverse party; and (3) shall lodge such notices with the Clerk of the Peace for the Justices at Quarter Sessions. The order made at Petty Sessions in this case was made on the 15th May, 1896. The notice of appeal was served on the Justices at Petty Sessions on the same day. The defendant having disappeared, and the appellant being unable to find him, and his house being shut up, the notice of appeal was served on him by being posted on the door of his house on the 16th May, and on the same day the notice of appeal was lodged with the Clerk of the Peace. The words of the 83rd sect. are no doubt strong, but in my opinion the words "at and immediately upon the giving of the judgment appealed against," cannot be properly construed in their strictest sense. If so construed it would in many cases be impracticable to comply with them. A certain latitude of construction must be allowed, as it has been allowed in construing the word "immediately" in other Acts. Instances of this will be found in the cases of *Thompson* v. *Gibson* (1), *Page* v. *Pearce* (2), *Christie* v. *Richardson* (3), and other cases, and the words in question in the 83rd sect. ought in my opinion to be construed as meaning with all the expedition reasonably practicable, and in this sense they appear to have been complied with in the present case, and I think the service of the notices was sufficient, and, therefore, the third objection to the conviction in my opinion also fails.

The fourth and last objection to the conviction is that a previous summons was issued against the defendant, dated the 10th December, 1895, and was by order of the Justices at Petty Sessions dismissed without prejudice on the 20th December, 1895, and that although the complaint in that summons was under the 22nd sect. of 1 & 2 Wm. 4, c. 55, the facts on which it was sought to sustain it were the facts relied on to sustain the present prosecution under the 23rd sect., and further that as the dismiss without prejudice was (as it was said) an unauthorized order in so far as the words "without prejudice" were added, it must be taken to have been a dismiss on the merits, and therefore a bar to the present prosecution. Now, even assuming what I do not assent

(1) 8 M. & W. 281. (2) *Ibid.* 677. (3) 10 M. & W. 688.

to, much less decide, that if it ought to be held to be a dismiss on the merits of the charge under the 22nd sect. it was a bar to the prosecution under the 23rd sect., I think it clear that after the 20 & 21 Vict. c. 40, the dismiss without prejudice of the 20th December, 1895, was an authorized order, and therefore by its very terms no bar to any further proceedings, and this last objection to the conviction in my opinion also fails.

The result is that the cause shown against making absolute the conditional order for the *certiorari* must be allowed, and that order must be discharged with £6 6*s*. costs.

There was some suggestion during the argument that it might be inferred from the affidavit, on which the conditional order was obtained, that the conviction at Quarter Sessions was without any evidence to support it. This, however, was not contended before us, and I only wish to say, as the question was referred to, that in my opinion there was ample evidence to support it. I desire to add that although I thought it better to deal with all the objections to the conviction which were raised before us, as they were argued on both sides, we are not to be taken as holding that having regard to the affidavits on which the conditional order was obtained, and to the fact that the conviction was on an appeal to the Quarter Sessions, the objections argued before us were all open to the defendant. What we decide is that, assuming them to have been all open, none of them can be sustained.

MURPHY, J., concurred.

Solicitor for M'Aleer: *P. Gallagher.*

Solicitor for the prosecutor: *The Solicitor of Inland Revenue.*

J. P. B.

Ex. Div.
1896.

June 26, 27.
Oct. 30.
Dec. 4.

Appeal.
1897.

Feb. 3.

KENNEDY *v.* HEALY.

(1895. No. 1778.)

Practice—Costs—Taxation—Separate causes of action—Apportionment—Expenses of witnesses—Judicature Act, sect. 53—Half costs—R. S. C. I., Ord. LXV., Rule 3.

In an action for trespass to the person and for money received to the plaintiff's use, the jury found for the defendant on the cause of action in *tort*, and £2 for the plaintiff on the other cause of action. Judgment was entered for the defendant with costs on the first cause of action, and for the plaintiff on the second, with legal costs if any. Certain witnesses at the trial gave material evidence on both causes of action:—

Held, that the Taxing Master was right in apportioning the expenses of these witnesses; in allowing, as part of the plaintiff's costs, part of the necessary expenses of such of those witnesses as were examined on his behalf; and in taxing to the defendant, as part of his costs payable by the plaintiff, an apportioned part of the expenses of such of these witnesses as were produced for the defendant.

When a plaintiff recovers less than £20 in an action of contract the one half of the ordinary costs to which only, in the absence of a certificate he is entitled, is one half only of disbursements as well as of profit costs.

Motion by the plaintiff for review of the taxation of costs.

The statement of claim contained two causes of action—(1) trespass to the person, and (2) money had and received. The action was tried before Mr. Justice Gibson and a jury of the city of Dublin in the Easter Sittings, 1896; and the jury found a verdict for the defendant on the first cause of action, and on the second cause of action for the plaintiff for £2. The Judge thereupon gave judgment for the defendant "as to all the causes of action in the claims mentioned, save the cause of action for money had and received, with costs"; and as to the cause of action for money had and received he gave judgment for the plaintiff "for the said sum of £2 as aforesaid, with legal costs, if any." Some of the witnesses produced by each party at the trial gave material evidence on both causes of action. On the taxation of the costs the Taxing Master apportioned the expenses of each witness of this

class, and allowed, as part of the plaintiff's costs, part only of the necessary expenses of such of those witnesses as were produced for him; and further, he taxed to the defendant, as part of his costs payable by the plaintiff, an apportioned part of the expenses of such witnesses of this class as were produced by the defendant. In allowing half costs to the plaintiff he only allowed the half of profits and disbursements. Some other minor questions of detail were also in controversy upon the taxation.

The plaintiff objected to this taxation, and applied to have same reviewed.

Bushe, Q.C. (with him *W. A. Ryan*), for the plaintiff:—

When the plaintiff succeeds on one issue and the defendant on the other, the plaintiff is entitled to the general costs of the action, and the defendant to the costs of the issues on which he succeeds exclusively: *Morgan* v. *Gray* (1); *Myers* v. *Defries* (2); *Sparrow* v. *Hill* (3); *Smith* v. *Campbell* (4); *M'Gildowney* v. *Legg* (5), and *Garnett* v. *Bradley* (6). The difference between the provisions of the English Judicature Act and the Irish Judicature Act is that the latter preserves the section of the Common Law Procedure Act, 1853, limiting the amount of costs, and the costs should be taxed according to the Act of 1853, and not according to the Judicature Act: *Lapsley* v. *Blee* (7), and *Cassidy* v. *O'Loghlen* (8).

[Counsel also referred to Yeo and Billing's Practice, p. 237, Ferguson's Practice, p. 1213; Field's Practice, p. 988; *Staniland* v. *Ludlam* (9).]

Half costs within Order LXV., Rule 3, means half of profit costs. Disbursements have been always allowed in full irrespective of the amount recovered.

The Rt. Hon. C. H. Hemphill, Q.C. (with him *P. H. Law Smith*), for the defendant:—

1st. As to half outlay there is no distinction made in any

(1) 10 Ir. Jur. (N. S.) 335.
(2) 5 Ex. Div. 180.
(3) 8 Q. B. Div. 479.
(4) 29 Ir. L. T. R. 97.
(5) 30 Ir. L. T. R. 9.
(6) 3 App. Cas. 944.
(7) 6 L. R. Ir. 155, 161.
(8) 4 L. R. Ir. 1.
(9) 4 B. & C. 889.

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statute or rule from the Statute of Gloucester, between profit costs and expenses; the word "costs" alone is used.

2nd. As to the general costs of action, *Morgan* v. *Gray* (1) does not apply where distinct causes of action are introduced, and separate judgments have been entered for plaintiff and defendant, as in *Myers* v. *Defries* (2). The practice in the Chancery Division in England should be followed here, as laid down in *Jenkins* v. *Jackson* (3). Sect. 53 of the Irish Judicature Act is different from the English Act and Rules. *Griffiths* v. *Patterson* (4), although decided on claim and counterclaim, decides the principle raised here, as there is no distinction between claim and counterclaim, and separate causes of action introduced into a statement of claim.

At the conclusion of the arguments the Court decided in favour of the defendant upon all the points raised except the question of the apportioning of the witnesses' expenses, as to which judgment was reserved.

Dec. 4.

The judgment of the Court (PALLES, C.B., and ANDREWS and MURPHY, JJ.) was delivered by—

PALLES, C. B. :—

This is a motion by the plaintiff for review of the taxation of costs. At the hearing of the motion many questions were argued; and we gave judgment in favour of the defendant on all of them except one, which we reserved for further consideration, as its solution appeared to involve an important question of principle, which, as far as we are aware, has not been as yet expressly decided in this country.

It arises in this way. The statement of claim contained two distinct causes of action: one trespass to the person; the other for money received to the plaintiff's use. At the trial the jury found for the defendant on the first cause of action, and on the second they found for the plaintiff for the sum of £2. Mr. Justice Gibson, before whom the action was tried, gave judgment "for the defendant Healy, as to all the causes of action in the claim

(1) 10 Ir. Jur. (N. S.) 335.
(2) 5 Ex. Div. 180.
(3) [1891] 1 Ch. 89.
(4) 22 L. R. Ir. 656.

mentioned, save the cause of action for money had and received, with costs"; and as to the cause of action for money had and received, he gave judgment "for the plaintiff for the said sum of £2, as aforesaid, and legal costs, if any." Certain of the witnesses produced on each side at the trial gave material evidence on both causes of action. The Taxing Master apportioned the expenses of each witness of this class, and allowed, as part of the plaintiff's costs, part only of the necessary expenses of such of those witnesses as were produced for him; and further, he taxed to the defendant, as part of his costs payable by the plaintiff, an apportioned part of the expenses of such witnesses of this class as were produced for the defendant. The objection of the plaintiff is that the necessary expenses of those witnesses are part of the "general costs of the action," that the entire of the expenses of such of them as were produced for the plaintiff should be allowed to him, and that no part of the expenses of the witnesses of this class who were produced by the defendant should have been taxed to the latter. This objection assumes that, since our Judicature Act, the plaintiff is, in a case like the present, entitled to the general costs of the action; and whether he is so entitled or not is the matter for decision here.

It may be assumed that, had the case been decided before our Judicature Act, the plaintiff would have been so entitled. The Statute of Gloucester conferred upon a successful plaintiff a right to his costs of suit; and, save to the extent to which that right was interfered with by subsequent legislation, it continued to exist until our Judicature Act.

Of the many limitations on this right imposed by legislation prior to the Judicature Act, it is material here to refer to one only, viz. that effected by sect. 60 of our Common Law Procedure Act of 1853, 16 & 17 Vict. c. 113. That section enacted that "the costs of every issue, whether of fact or law, shall follow the finding or judgment upon such issue." This enactment, it will be observed, is limited to the costs of "issue." It does not extend to the costs in the cause, by which I understand such costs as would have been incurred, had the writ or pleading not contained the claim which resulted in the finding or partial judgment against the party who is substantially successful. Under this statute, it

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was quite settled that where there were, in one writ of summons, two independent causes of action, on one of which the plaintiff, and on the other the defendant, succeeded, the former was entitled to the general costs of the cause, whilst the defendant was entitled only to such costs as were applicable exclusively to the issues on which he succeeded: *Morgan* v. *Gray* (1). If, then, the Judicature Act has not altered a plaintiff's right to costs in this respect, the taxation here ought to be reviewed; and this brings me to the important question of the effect of the 53rd section of the Judicature Act.

It is clear, in the first place, that the provision in that section, that "subject to the provisions of this Act, and of Rules of Court, the costs of . . . every proceeding . . . shall be in the discretion of the Court," repealed the Statute of Gloucester. It is inconsistent with the right of a successful plaintiff to his costs that those costs should be in the discretion of the Court. Therefore, the plaintiff's right in the present case cannot depend upon the Statute of Gloucester.

The section, however, proceeds to enact that "the costs of every *action*, question, and issue tried by a jury, shall follow the event, unless, upon application made, the Judge at the trial or the Court shall for special cause shown and mentioned in the order otherwise direct."

In the present case, the Judge did not by order "otherwise direct."

In considering the effect of this provision, it is to be remembered that it is settled, both in this country and in England, that "event" must, in a case such as the present, be construed distributively. I also think it clear that the expression "action" must also be construed distributively. The event, not of the entire action, but of part of the action, has been in favour of the plaintiff; the event of the other part of the action has been in favour of the defendant; and as the costs of the action are directed by the statute to follow the event, the only costs by this enactment given to the plaintiff are the costs, not of the entire action, but of so much of the action as related to money received

(1) 10 Ir. Jur. (N. S.) 335.

for his use; and the defendant is, under the same enactment, entitled to so much of the costs of the action as relate to the other causes of action. I think it follows that neither plaintiff nor defendant is entitled to the general costs *of the action*. The statute gives the plaintiff the costs of part, but of part only, *of the action*. It gives the defendant the costs of the other part of the action. The defendant appears to me to be entitled to have his costs of the part of the action upon which he has succeeded taxed upon the same principle as ought to be applied to the plaintiff's costs of the residue of the action; and, therefore, the basis of the principle of taxation which existed before the Judicature Act, and which was affirmed in *Morgan* v. *Gray* (1) has, since that Act, ceased to exist.

In this state of facts, the necessary result appears to me to be that the costs which were formerly taxed as the general costs of the action should now be apportioned between the plaintiff and the defendant.

This new principle of taxation was applied by the Court of Appeal in England in *Shrapnel* v. *Laing* (2) to a case of claim and counterclaim, in which the plaintiff succeeded upon the claim, and the defendant on the counterclaim. It was further applied by the Court of Appeal in this country in *Griffiths* v. *Patterson* (3) to a case in which the plaintiff succeeded upon both claim and counterclaim, but under circumstances in which the scale of allowances applicable to the costs of his claim was less liberal than that upon which his costs of defending the counterclaim were taxable.

There is, however, no case to which we have been referred, or of which we are aware, in which this principle has been applied, in a Common Law Division, to a case like the present, of two causes of action in the claim; and we are informed by the Taxing Master, with whom we have conferred upon the subject, that the practice has been to allow the plaintiff, in a case such as the present, his general costs of the action. We, however, are of opinion that there can be no valid distinction between the two cases, and that the principle applicable to one must also apply to the other.] No doubt the judgments, both in *Shrapnel* v. *Laing* (2)

(1) 10 Ir. Jur. (N. S.) 335. (2) 20 Q. B. D. 334. (3) 22 L. R. Ir. 656.

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and *Griffiths* v. *Patterson* (1), are clearly expressed to be based upon the ground that "the claim is a cause of action by itself, and the counterclaim is another and independent cause of action, and to be treated as if the claim did not exist"; and in *Winterfield* v. *Bradnum* (2) it is said that "claim and counterclaim are to be considered to be wholly independent suits, which for convenience of procedure are combined in one action." But where, as here, there are in a single action two independent causes of action, upon each of which a separate action might have been brought, and there has been a different result as to each, I am of opinion that this single action must, for the purposes of this 53rd section, be treated, as are claim and counterclaim, as two independent actions. The question in each of these cases depends upon the meaning of the words "action" and "event" in the 53rd section.

My only difficulty in the case arose from observations of Bramwell, L.J., in *Myers* v. *Defries* (3), from which, in conjunction with *Sparrow* v. *Hill* (4), and *Abbott* v. *Andrews* (5), the authors of the "Annual Practice (ed. 1897, p. 1148) deduce the following rule:—"Where the plaintiff joins in his claim different causes of action . . . and the plaintiff succeeds on one issue, but the defendant succeeds on the others the plaintiff is entitled to the general costs of the action, but the defendant is entitled to the costs of the issues on which he has succeeded." I have no reason to doubt that this passage accurately states the practice in England, and that the observations of Lord Justice Bramwell in *Myers* v. *Defries* (3) (which arose on the English Order LV., Rule 1 of 1875) support the position. There the learned Lord Justice says:—"Upon this view the plaintiff, if he is not deprived of his costs either by order of the Judge or under the County Courts Act, will still be *entitled to the general costs of the cause*, from which must be deducted the costs of the portions of his claim as to which the defendant has succeeded." Thesiger, L. J., adds:—"In my opinion the *general costs of the cause follow the judgment*; but the costs of the particular issues must be respectively taxed in favour of the party who has succeeded on them."

(1) 22 L. R. Ir. 656.
(2) 3 Q. B. D. 324.
(3) 5 Ex. D. 180.
(4) 8 Q. B. D. 479.
(5) *Ibid.* 648.

I have no desire to detract from the authority of anything said by either of these great Judges, even as to matters not necessary for their decision; but still I must point out that, in that case, the plaintiff had been deprived of costs by a previous order, that the question before the Court was not as to *his* costs, nor as to anything connected with the general costs in the cause, and was confined to the defendant's right to the costs of the issues found in his favour. The actual *decision* there was that "event" in Order LV., Rule 1, was to be construed distributively: a decision which is the basis of our present judgment.

The question was further considered in *Sparrow* v. *Hill* (1) (to which I shall hereafter refer in detail), and in *Abbott* v. *Andrews* (2). After much consideration of these cases, and the other decisions on the subject, I have arrived at the conclusion that the result stated in the "Annual Practice," has been arrived at in the Common Law Divisions in England from the adoption by those Divisions of a peculiar construction of the judgment or order as to costs in general use there: a construction which our Judicature Act (in this respect differing from the English Order LV., Rule 1) not only precludes us from giving to the judgment in the present case, but which, if applied to that judgment, would render it one in violation of the 53rd section.

My meaning will be made more clear by a reference to the decision of the Court of Appeal in England in *Jenkins* v. *Jackson* (3). That was an action for nuisance by vibration and offensive behaviour. Judgment was given for the defendant on so much of the statement of claim as related to offensive behaviour, and damages were awarded to the plaintiff on the ground of nuisance by vibration. The judgment referred it to the Taxing Master to tax the defendant's costs of *so much* of the action as related to offensive behaviour, and to tax the plaintiff's costs of *the rest* of the action; to set off the defendant's costs against so much of the plaintiff's costs, and to certify the balance; and the judgment proceeded to direct payment of the balance due by the defendant to the plaintiff. The Taxing Master allowed the plaintiff one-half of each item which related to both issues,

(1) 8 Q. B. D. 479. (2) *Ibid.* 648. (3) [1891] 1 Ch. 89.

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and allowed in full the items which related solely to the issue upon which he succeeded; and he followed the same principle in taxing the defendant's costs, with the result that there was a small balance due by the plaintiff to the defendant. The plaintiff appealed from this taxation to Mr. Justice Kekewich, relying upon *Sparrow* v. *Hill* (1). The learned Judge, desiring the assistance of the Taxing Masters, sent a memorandum to them, referring, amongst other cases, to *Sparrow* v. *Hill* (1); and in reply he received a note from them stating as follows:—"There are two forms of order. In one, which is the form adopted in *Jenkins* v. *Jackson* (2), the plaintiff gets his costs of one issue, or as in this case of one part of his claim, and the defendant of the other. There is nothing in the order to show that one is more important than the other; nor has the Master any power to discriminate between them. He, therefore, divides the general costs in moieties, but gives to each party such part of every affidavit or document as relates to that part of the claim on which he succeeded, disallowing the rest. In cases where the Court considers the plaintiff or defendant entitled to more than this, the order gives him 'the costs of the action, except so far as they have been increased by the unsuccessful issue.' This gives him all the general costs, but the Master eliminates everything relating to the issue on which he failed." The Masters also called attention to the case of *Harley* v. *Hunt* (3), a case which having been reported in the "Weekly Notes" only, had not been cited before Mr. Justice Kekewich.

Harley v. *Hunt* (3) was a decision of the Court of Appeal upon an appeal from the Vice-Chancellor of the Palatine Court, and raised the question of the principle of taxation of costs under an order which was substantially in the form of that in *Jenkins* v. *Jackson* (2). In that case also *Sparrow* v. *Hill* (1) was cited. Cotton, L.J., there said:—"It must be borne in mind that the Vice-Chancellor was a Chancery Judge, and had no jurisdiction in the Palatine Court except equity jurisdiction, and that the usual order in Chancery suits was that the costs in such a case should be apportioned. The Vice-Chancellor had in fact made the order in

(1) 8 Q. B. D. 479. (2) [1891] 1 Ch. 89. (3) Weekly Notes, 1887, p. 184.

the form usual in Chancery suits. Bearing this in mind he could only come to the conclusion that the Judge meant that the costs should be apportioned." Then, he proceeds:—"In *Sparrow* v. *Hill* (1), the order was in a different form, and it was a common law action, and in that case the Court did not lay down any rule as to orders made in Chancery actions." The appeal was accordingly dismissed.

The pleadings and judgment in *Sparrow* v. *Hill* (1) are stated in the report of that case before the Queen's Bench Division (2). The claim, which was one for above £1000, was in respect of three different classes of work. As to two of these, the plaintiff failed; upon the third he recovered, under the award of an arbitrator, the sum of £37 0*s.* 3*d.*, and he obtained judgment that he should recover that sum, and "such costs as one of the Masters may find he has rightly incurred in recovering the above amount to be taxed; and that the defendants recover against the plaintiff such costs as they have rightly incurred in defending themselves on those points on which they have succeeded, to be also taxed." In the Court of Appeal, Bramwell, L.J., says:—"I interpret this order to mean that the plaintiff is to get the general costs of the action, but not the costs of attempting to recover the items of claim as to which he failed. I think the defendants are to have such costs as they incurred in defending themselves against claims which were unfounded." Brett, L.J., says:—"It seems to me that the whole of Mr. Graham's argument is that, since the Judicature Act, costs in any action are to be dealt with just as costs used to be in a Chancery suit. He cited cases to show there were only two forms of orders as to costs in a Chancery suit, and which were interpreted in a particular way. The fact is there were costs applicable to a common law action, and there were costs applicable to a Chancery suit, and they were different from each other, because the subject-matter of each was different, and it was necessary they should be differently dealt with. There was nothing in the Judicature Act to alter this; and, therefore, when an action in the High Court is in a Common Law Division, the only proper way to deal with the costs is to treat the action as if it were a common law action. But, however, be that as it

(1) 8 Q. B. Div. 479. (2) 7 Q. B. Div. 362.

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may, no cases or authorities can help us in construing this order, and the question we have now to determine is what is its meaning? . . . It is entirely a new form of order, and one *sui generis*." Cotton, L.J., who was one of the Judges who had decided *Harley* v. *Hunt* (1), said:—"The question which we have to consider is what does the order in the present case mean? It does not give a portion of the costs of this action to one of the parties, and a portion of them to the other, but, in my opinion, it gives the general costs of the action to the plaintiff, except such as were incurred with reference to the unfounded part of his claim, and which the defendants are to get."

In reference to this case and *Harley* v. *Hunt* (1), Kekewich, J., in his judgment in *Jenkins* v. *Jackson* (2), says:—"But when I turn to *Harley* v. *Hunt* (1), and contrast it with *Sparrow* v. *Hill* (3), I find that if this action of *Jenkins* v. *Jackson* had been tried, as it very well might have been, in the Queen's Bench Division, either at the Assizes or elsewhere, and the same result had followed as regards the law and relief granted, there would have been a different system of taxation, and the order probably would have been worded somewhat differently. I cannot help thinking that it is an anomaly in the uniform practice intended to be established by the Judicature Act, and that something ought to be done to reduce the rules of the two offices to one and the same basis." The plaintiff then appealed to the Court of Appeal; the appeal was heard by Lindley, Bowen, and Fry, L.JJ., who held that the wrong form of order had been adopted by Kekewich, J., that he really intended to give the plaintiff the general costs of the action, but that it was impossible to construe his order as doing so. The judgment of Bowen, L.J., is important as showing the different modes of construction adopted by the Court of Appeal there of the same words, according as the order is one of a Chancery Judge, or of a Common Law Division. He says:—"I think . . . that here the wrong form of order has been adopted. It seems to me that the Judge really intended to give the plaintiff the general costs of the action. That is a kind of order to which, on the common

(1) Weekly Notes, 1887, p. 184. (2) [1891] 1 Ch. D. 95. (3) 8 Q. B. D. 479.

law side, we are more accustomed than to an order apportioning costs. Of course the Chancery Division has its own forms, which are more appropriate to the business of that Division." And then he uses these remarkable words:—"I also think that, on the common law side of the Court, we should probably have construed this order as giving the plaintiff the general costs of the action; but it seems to me that in Chancery this form of order has been construed in a different way, and that the case of *Knight* v. *Pursell* (1), which cannot be overruled or disregarded, settles the practice." And then he adds, "I have been constantly pressed, for the last twelve years during which I have been a Judge, with the difference of opinion and practice that exists as to costs in the Chancery Division and the Queen's Bench Division; and it seems to me that nothing can be more important than that this difference should be methodically inquired into, with the view of establishing a uniformity of practice in this respect between the two Divisions."

The only other case to which it is necessary to refer, *Abbott* v. *Andrews* (2), decides nothing more than that a defendant is entitled to his costs of issues upon which a plaintiff is non-suited.

Happily, the decisions in this country have not, as yet, involved us in this anomaly of being obliged to construe the same words in an order in different senses, according as it is made by an Equity or by a Common Law Judge; nor, as it appears to me, can we in this country, in relation to cases tried by juries, ever be involved in such a difficulty; as the single rule laid down by the statute, applicable to all jury cases (irrespective of the Division they may be in), cannot in this country be departed from, unless for special cause which is "mentioned in the order." This common rule in all the Divisions affords us one safeguard for uniformity which is absent in England. The state of the decisions there, to which I have briefly referred, conveys a warning to us not to depart from that which we are satisfied is the true construction of our own statute, merely to conform to the practice in one Division in England differing from that of another Division—a course which would involve us here in the anomaly which exists there. In this

(1) 49 L. J. (Ch.) 120. (2) 8 Q. B. D. 648.

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country the fact that an order does not upon its face show special cause is an element in determining whether that order directs that the costs shall be borne in a mode different from that directed by the Act. In the present case no such question can arise. It seems clear that the order simply follows the statute. I construe the statute, for the reasons I have already stated, as directing, in a case like the present, an apportionment of costs. I hold that the cases in the Queen's Bench Division in England were decided on the construction of the words there used, and that they are therefore not applicable here; and upon the whole, notwithstanding the expressions of Lord Justice Bramwell and Lord Justice Thesiger, I feel bound to act upon my own construction of the section, and hold that the Taxing Master rightly allowed to the plaintiff a portion only of the necessary expenses of witnesses whose evidence was material upon both causes of action. It is true that this principle, had it been fully applied by the Master to the costs in question, would have borne a result much more favorable to the defendant; but he has not appealed.

We must, therefore, affirm the taxation, and refuse the plaintiff's motion, with costs.

J. P. B.

Appeal. 1897.

Feb. 3.

The plaintiff appealed to the Court of Appeal.

Bushe, Q.C., and *W. A. Ryan*, for the appellant.

The Right Hon. C. H. Hemphill, Q.C., and *P. H. Law Smith*, for the respondent.

The Court (FITZGIBBON, BARRY, and WALKER, L.JJ.) affirmed the judgment of the Exchequer Division, and dismissed the appeal with costs.

Solicitor for the plaintiff: *Brady.*
Solicitor for the defendant: *Menton.*

R. D. M.

REG. (WALSH AND EVERARD) *v.* JUSTICES OF CO. CAVAN (1).

Q. B. Div. 1896. Dec. 8, 12.

Tithe rentcharge—Variation—"Corn principally grown in the county"—"Wheat or oats"—Certificate of tithe composition not stating the species of corn principally grown—Order of Quarter Sessions varying the tithe rentcharge on the price of wheat and oats together—4 Geo. 4, c. 99, ss. 25, 43—1 & 2 Vict. c. 109, s. 32.

Where the original certificate of tithe composition does not state "the average price of wheat or oats" (whichever of the two the Commissioners shall consider as the "corn principally grown in the county") for the prescribed period, the Justices at Quarter Sessions, on an application to vary the tithe rentcharge, should inquire into and determine the question which of the two species of corn, wheat *or* oats, was the corn then principally grown in the county, and proceed thereon in their computation of average prices for the purposes of the application before them.

CERTIORARI. This was a motion to make absolute a conditional order to remove and quash an order made by the Chairman of Co. Cavan (His Honor Judge Waters) at the Quarter Sessions of the Peace held at Bailieborough on the 17th June, 1896, varying the tithe rentcharge payable out of the parish of Killesherdan. The grounds upon which the conditional order was obtained, as set out therein, were that the order of Quarter Sessions was without and in excess of jurisdiction, that the Court did not determine the species of corn upon which the order was based, and that the order was bad, in substance form and effect, for insufficiency. It was not disputed, and may be taken to be the fact, that the application to the Quarter Sessions was duly made, and the order of that Court correct, save as to the point in controversy, namely that the learned Chairman had varied the tithe rentcharge on the average price of "wheat and oats" taken together. The certificate of tithe composition for the parish (dated the 15th October, 1833) did not state the particular species of corn which

(1) Before O'BRIEN and GIBSON, JJ.

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the Commissioners considered to be the corn principally grown in the county, nor its price. The order of Quarter Sessions, after reciting, *inter alia*, the posting of notices of intention to apply "to the Justices at said Quarter Sessions to have the average price of wheat *and* oats (1) for the seven years preceding, inquired into and ascertained" for the purpose of variation, and the service of "an application in writing, in the terms of the said notice, to the Justices presiding at said Quarter Sessions, to ascertain the average price of corn as advertised in the *Dublin Gazette* during the seven years preceding the application . . . and it appearing that the price of corn is not stated in such certificate, and on hearing evidence of the price per barrel of oats and of the price per barrel of wheat for the seven years preceding 1830, and of the price per barrel of oats and of wheat per barrel, for the seven years preceding the application, . . . ordered that the amount of the composition, £230, mentioned in the certificate as payable to the Lay Impropriators, should be diminished by £82, and should be in future £148 annually, and that, pursuant to 1 & 2 Vict. c. 109, the rentcharge (£172 10*s.*), being three-fourths of and in lieu of the composition, should be £111 (three-fourths of £148) annually, and that the assessment and applotment should be amended accordingly."

Mr. Allen, the solicitor for the Lay Impropriators, in the affidavit on which the present application was grounded, stated that, at the hearing at Quarter Sessions, he had submitted to the learned Chairman that under the circumstances he was bound to find, as a fact, which of the two, whether wheat or oats, was the corn principally grown in the county for the period of seven years ending the 1st November, 1830, and that any variation must be based on a comparison between the average price of the particular species of corn so ascertained by him during that period and the average price of that species for the seven years preceding the application, to be ascertained from the *Gazette*; that the learned Chairman declined to inquire what species of corn was, as a matter of fact, principally grown in the county for the period ending 1830, and said that, under the statute 1 & 2 Vict. c. 109, he was bound to define "corn" as "wheat and

(1) The words in the original notices here in recital were "wheat or oats."

oats," and would not limit the definition of "corn" to "wheat" *or* "oats"; that, evidence having been given of prices, the Chairman added the average prices of wheat and of oats per barrel, so proved for the seven years' period ending 1830, dividing the result by two, and added the average prices of wheat and of oats per barrel, so proved for the seven years preceding the application, dividing the result by two, and reduced the tithe rentcharge in the ratio of these sums. An affidavit, as cause, was filed on behalf of the tithe-payers, in which it was stated that the Chairman had held that the 32nd section of 1 & 2 Vict. c. 109 contemplated the ascertainment by him of the average price of "corn," and not merely one species thereof.

[The following sections of the various Tithe Acts were discussed at length during the argument by counsel on both sides, and for convenience are here referred to:—4 Geo. 4, c. 99, sections 25, 27, 28–30, 31, 43, 44, 57, and schedule (B); 5 Geo. 4, c. 63, ss. 17, 23, 24, 25, 26; 2 & 3 Wm. 4, c. 119, ss. 1, 6, 31; 1 & 2 Vict. c. 109, ss. 1 and 32 (1)].

R. E. Meredith, Q. C. (*Herbert Wilson*, with him), for the prosecutors:—

The Chairman proceeded on a wrong basis, and the conditional order should be made absolute. Tithe rentcharge, under sect. 32 of the Act 1 & 2 Vict. c. 109, is variable in the same manner as tithe composition was. Under 4 Geo. 4, c. 99, ss. 25 and 43, tithe composition was variable upon a comparison of the price "of wheat *or* oats," for the period of seven years preceding the application, with the average price of wheat or oats ascertained in their certificate by the Commissioners, the Commissioners being bound to state in their certificate (sect. 25) "the average price of wheat or oats (whichever of the two they shall consider as the corn principally grown in such county)," or with such average price ascertained from the *Gazette* (1 & 2 Vict. c. 109, s. 32). The Act of 5 Geo. 4, only uses the word "corn"; the Act of 2 & 3 Wm. 4

(1) It was noticed during the argument that Statute Law Revision has repealed the first three of these statutes in their entirety and a great portion of the last.

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only uses the words "wheat or oats" once, and elsewhere (twice) the word "corn." The Act of 1 & 2 Vict. c. 109, only uses the word "corn" (sect. 32). But, in all these cases, "corn" must mean the same as "wheat or oats." There is no other measure of comparison as the basis of variation. In the present case the Commissioners neglected their duty, and did not state, as they were required to do, which of the two, wheat *or* oats, they considered to be the species of corn principally grown in the county. We do not contend that their neglect is irremediable, but it can only be remedied by the Court of Quarter Sessions doing what the Commissioners should have done, that is ascertaining which of the two species of corn was, at the date of the certificate, the corn principally grown in the county. The Commissioners could not, and the Court of Quarter Sessions cannot, aggregate the prices of both together, as has been done in this case, and thereon strike an average, and estimate the amount of the variation that should be made. There are, we understand, certificates in existence which purport to state the average price of other titheable articles, "as the corn principally grown"; and in one case, *Reg.* v. *Justices of Co. Cork* (*Norcott's Case*) (1), one of the certificates stated that "barley" was, in the opinion of the Commissioners, "the corn principally grown"; but no question was apparently raised upon this point in the Court of Appeal (2); and the decision cannot be taken as an authority for holding that any other basis of variation can exist except either wheat or oats. The learned Chairman, therefore, should have accepted the evidence that was tendered, and have ascertained which of the two species was principally grown in the county at the date of the certificate, and have thereupon determined what variation, if any, should be made in the tithe rentcharge. Having refused to do this, his order is bad, and *certiorari* lies to quash it: *Norcott's Case* (1).

Denis Henry, Q.C., and *T. J. Smyth*, for the respondents:—

The Chairman had jurisdiction to deal with the case; the objection is merely that certain evidence was refused, therefore sect. 57

(1) 28 L. R. Ir. 185. (2) See footnote (1), p. 276.

of Goulburn's Act, taking away *certiorari*, applies. In *Norcott's Case* (1), the objection was that there was no jurisdiction to entertain the application at all. But, in any event, the Chairman acted rightly, for where the certificate was silent he was bound "to ascertain from the *Gazette* the average price of corn" (see the last proviso in sect. 32 of the Act of 1838), "with reference to which such composition *may* have been calculated, and deal therewith as if the same had been originally stated in such certificate." "Corn" there must mean the *genus*, not one particular species of corn. It is noticeable that the Act of 1 & 2 Vict. c. 109, was passed immediately after the decision in *Walker* v. *Coghlan* (2)—and see O'Leary on Tithes, p. 121—the last provisoes in sect. 32 being apparently directed to remedy the defect in the earlier Acts thus shown to exist. The present point was raised in this Court in *Reg.* (*O'Ferral*) v. *Justices of Meath* (3), and, though not the ground of the decision of the Court, was referred to in the judgment of Mr. Justice O'Brien, who considered that the rentcharge might be varied on the basis of both species, wheat and oats, taken together.

H. Wilson, in reply:—

The word "corn," wherever used in these Acts, must be taken distributively, as meaning one of the two, wheat or oats, whichever of the two was stated in the original certificate as the corn, that is the species of corn, principally grown in the county. The propriety of "barley" in the certificate in *Norcott's Case* (1), must have been unquestioned *per incuriam*. The recital in sect. 32 demonstrates that "corn" is used merely for brevity to designate "wheat or oats," and in the second of the two concluding provisoes in the section, upon which the respondents rely, the words "price of corn" must mean the same as "the price of any particular species of corn" in the first, and the words "the same" must mean "the price of" a "particular species of corn," referring back to the first proviso, not to the word "corn" in the second. These Acts would seem to be carelessly drafted, and

(1) 28 L. R. Ir. 185. (2) 1 Cr. & Dix, Abr. Notes, 12 [1837]
(3) [1896] 2 Ir. R. 1.

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apparently, though it is hard to understand whether this be the result of intention or oversight, on a second application to vary, the variation can only be made on the "average price of wheat"(1), no matter what species may be mentioned in the original certificate (2).

Cur. adv. vult.

Dec. 12.

O'BRIEN, J. :—

In a certificate of tithe composition for a parish, the total amount payable is set forth, but the clause stating the species of corn principally grown in the county, whether wheat or oats, with the price, which is to be the standard for variation, is omitted altogether, and the question is what is to happen in consequence. The County Court Judge lumped the price of wheat and oats together from the *Gazette* of the time, with the necessary result from the comparative decline in wheat of an enormous disparity in the prices of the present day, and consequent reduction in the rentcharge compared with what would be the case if oats alone were to be taken as the standard. This course he took under the supposed authority of the proviso contained in the

(1) Section 43 of Goulburn's Act, 4 Geo. 4, c. 99.

(2) In *Norcott's Case* and *Nason's Case* (28 L. R. Ir. 185), the order of Quarter Sessions giving no grounds for the refusal to vary the tithe rentcharge, and the conditional order of the Queen's Bench Division having been obtained by the tithe-payers, and no cause-affidavit being filed on behalf of the respondents (Norcott and Nason), the objections of the latter to a variation of the tithe rentcharge do not appear on the records; but apparently the question whether "barley" in *Norcott's Case* could be a basis for tithe rentcharge variation was not raised either in the Queen's Bench Division or Court of Appeal. The absolute order of the Queen's Bench Division simply directs the issue of a writ of *certiorari* to quash the order of Quarter Sessions, and of a writ of mandamus commanding the Justices to enter continuances upon "and hear and determine according to law . . . the matter of the said application . . . with reference to the diminution of tithe rentcharge in the said parish." The order in *Nason's Case* (in which oats is mentioned in the original certificate of tithe composition) was in identical terms. The order of the Court of Appeal simply affirmed the decisions appealed against. There seems thus to be no authority for the introduction of "wheat" into the head note. It is to be observed, however, that both cases were instances of a second revision of the rentcharge.

end of the 32nd sect. of the Act of 1 & 2 Vict. c. 109, which is as follows:—"Provided that when the price of any particular species of corn shall be stated in the certificate of such composition, the Justices to whom such application may be made shall ascertain the average price of that species of corn from the said *Gazette*, and such comparison shall be made between the price thereof as stated in such certificate and the price thereof as so ascertained from the said *Gazette* during each period of seven years; and provided further that where the price of corn shall not be stated in any such certificate of composition, the said Justices shall ascertain from the said *Gazette* the average price of corn for the period of years with reference whereto such composition may have been calculated, and deal therewith as if the same had been originally stated in such certificate." O'Leary on Tithes (1), in a note on this last clause, says that the Justices must first determine what was the species of corn "with reference to which the amount of the composition may have been calculated." Besides that the text-writer has not taken any notice of the objection against introducing evidence not directed by the statute, the statement is certainly a misconstruction of the meaning, and not even an accurate statement of the words of the clause. It is not the species of corn but the period of years with reference whereto the composition, not "the amount of the composition," may have been calculated, referring to the several periods of three and seven years that were named in the intervening statutes. That is an inquiry, however, which if not directed by the statute, is still necessary. The clause, to an ordinary mind, makes provision for two cases, for the case where the price of a species of grain is stated in the certificate, and the case where it is not stated. The latter case would necessarily be the converse of the first, and of the same extent, namely, the case where the price of a particular species of corn is not mentioned. Else on any other construction how could it be that in one case it was stated to be mentioned, while in the other a different thing was stated to be omitted, namely, not the price but the particular species of corn? One branch is put in opposition to the other, but these things, the

(1) Page 121, note (*b*).

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price and the corn, are not the opposite the one of the other. The price of corn, the omission of which is the thing dealt with in the last branch of the clause, must be the price of what alone the Commissioners had a right to insert, and that is the price of one species only. This argument is so insurmountable that counsel are forced to contend that the price of corn which is not stated in the certificate, is not the same thing as what the Justices have a right in the other case to ascertain from the *Gazette*, but that the latter means all corn; that, in other words, one thing being wanted, they have a right to supply two. This is still further evident, as was noticed by Mr. Wilson, from the concluding words, "as if the same had been originally stated in such certificate." What is "the same"? It cannot be wheat and oats, for only one could be mentioned if the certificate were right. And how were they to deal with it if it were mentioned? Only by comparison of the present price. The Justices were to be in the same situation after supplying the defect as if there were no defect. They had no function beyond that. Therefore I take it to be certain that the proviso was intended to meet the case where the price was not stated; but though in the average clause of Form B the species of corn is mentioned only in the sentence stating the price, the remedial clause missed the point of declaring in what way the species of corn was to be ascertained, because the *Gazette* could only give information as to the price.

What is the consequence of the defect if this be the true view? There are three ways out of the dilemma, and we must steadily look at the question all round to see which is the right one. We must force the word *corn* out of the inevitable sense which it possesses in the context into the larger meaning of corn of all sorts, or, at least, of the two sorts mentioned in the statute, in order to give effect to the general intention of the Act, and to prevent the right to vary being lost. That works out, in the actual instance, into dreadful injustice. Or, we must hold that the right to vary is gone because the machinery is defective. Or, we must decide lastly, that it was competent to the tribunal, by the nature of the function assigned to it, to ascertain facts which the Commissioners had failed to state. This last view is thought to be opposed to

the clause which expressly directs the Justices to ascertain the price. But, if we come to the conclusion that this clause is applicable only to the case where the species of corn is mentioned, the restriction on the inquiry may be considered to disappear with the conditions in which it exists, though this brings us upon the difficulty of making an inquiry which is not anywhere authorized, except it be by this clause, bearing in mind always that the Justices have merely a statutory function to execute. Some light, it was thought, might be thrown upon the way out of the difficulty by the case referred to in O'Leary on Tithes—*Walker* v. *Coghlan* (1)—anonymously reported in Crawford and Dix's Abridged Notes, where a case was reserved for the Judges, and Baron Pennefather announced their opinion that the certificate was good, though it did not contain the average clause. The question did not arise there upon an application to vary the composition, but in a suit for the amount; and therefore the decision contains no suggestion that the variation was to be carried out in such a case; for this reason that it might be contended that a partial execution of the duty of the Commissioners was valid for the purpose for which it was required, though the machinery would fail as to a change in the composition. As judicial decision sometimes appears to be a key to contemporary legislation, it was suggested in the argument that this case gave rise to the amendment in the 32nd section of the Tithe Rentcharge Act, 1 & 2 Vict. c. 109, by which the Justices were allowed to take the prices from the *Gazette;* but this argument will not go far enough, for the exigency of the correction did not require the word *corn* to be enlarged so as to include wheat and oats, as the applicant contends. It is inconceivable, if the Act were to have an effect so contrary to the whole scheme of the composition as that two or more species of corn could be taken instead of one, that it did not use other words. In *Norcott's Case* (2) the Court of Appeal, without objection, treated barley as within the words of the 32nd section, but that was where *barley*, though it may be without legal warrant, was mentioned in the certificate. It is right to say that the same construction that is now contended for was put by myself upon the 32nd section in the case of *The*

(1) 1 Cr. & D. Abr. Notes, 12. (2) 28 L. R. Ir. 185.

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Queen (O'Ferral) v. *The Justices of Meath* (1), in which the prices of wheat and oats were added together. That was not strictly a *dictum* in the proper sense of the term, for the objection was one that went to the validity of the order; but the case was decided wholly on other grounds, and I should regret if the County Court Judge were misled by a member of the Court that now has to correct him, though I hardly think that this was the case, for I would rather conclude that the practice of adding the two species of corn was not unknown before. I am now, however, convinced that my opinion, formed on a hasty perusal of the 32nd section, without any criticism of its real meaning from the previous words, was erroneous. However, it is easier to say in this case what is not legal than what is legal. It was not legal, in my judgment, to join wheat and oats together for the purpose of a standard. But, in a matter where there are arguments against any course that may be pursued, upon the assumption that some course must be taken, we have to consider the relative force of the objections that are urged, and try to find the solution which will do least violence to the words of the statute. On the one hand we have a process of inquiry laid down for the Justices which does not extend to taking any evidence but that of the *Gazette* and the certificate, and comparing present with former prices. But we do not know the price of wheat, for we have no certificate stating the species of corn; then we have to look at the statute to see whether the solution may not be that the certificate may be good for the composition but bad for the revision. That has never been held, so far as I know; and the 25th section of the Act of 4 Geo. 4, c. 99, in providing evidence for the future charge, and the 31st section, which declares the time—twenty-one years—for which the composition was to last, "subject only to such variation as may be made in the amount thereof according to the price of wheat or oats in any period of three years," and further, the subsequent change in the period of variation, and the means of evidence in the case of the assumed defect supplied by the Rent Charge Act of 1838, appear to make the right of variation inherent in the composition, and combine to justify a practice too

(1) [1896] 2 Ir. R. 1.

uniform to be disturbed, under which a right so important has struggled through all the blunders of the certificates. We have, therefore, a right continuing, and the machinery of evidence failing; and we have a certificate in blank, and the statute directing the mode of supplying the blank, but only supplying it in part; and that, in my opinion, gives implied authority to the Court of Quarter Sessions to supply the rest of the blank by now inquiring and ascertaining what was the corn principally grown in the county at the date of the composition. I am not certain but the authority would extend to ascertaining what is the species of corn principally grown at present, as the certificate is silent, and as it is agricultural produce that is made the measure of the ability to pay the rentcharge, it ought in reason to be the produce of the present day, and not that which existed under the influence of war prices and of import duties. But as the corn, if stated in the certificate, would have been unalterable, and we are directed by the 32nd section to take the prices from the past, I consider it less open to doubt, and a less advance upon the literal terms of the statute, to take the species of corn also from the past, as the prices which we have to adopt must be taken to be of something then existing, though not specified.

I am therefore of opinion that the order for a writ of *certiorari* ought to be made absolute, and that in the absence of any other mode of proceeding, and in order to continue the application and prevent the composition from remaining unchanged, there ought to be a mandamus to the Court of Quarter Sessions to enter continuances and proceed with the inquiry on the basis indicated and determine accordingly.

With reference to the argument of Mr. Henry, that it was what the Commissioners considered to be the corn principally grown in the county that they were to put in the certificate, and that the Quarter Sessions cannot substitute what upon evidence it considers to be the fact for the result of their consideration—in addition to other answers to this view, it must be observed that they are not directed to determine what is the corn principally grown, but they are to put the fact into the certificate, the consideration being merely the reason for it, and this fact is capable of being ascertained by evidence as well as as any other.

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GIBSON, J.:—

The price of corn having been omitted in the original certificate of composition, the learned County Court Judge held that, under 1 & 2 Vict. c. 109, section 32, wheat and oats were to be regarded as forming together a composite standard for comparison, and he accordingly rejected evidence to prove what was the corn principally grown in the county at the time of the original certificate. If the tithe-owners' contention is right, the calculation ought to have been made in reference to one of two kinds of grain, and the Court below has exceeded its jurisdiction, which is statutory. Whether the decision was right or wrong, depends entirely on the construction of the 32nd section already referred to. To interpret it we must consider the antecedent legislation.

The governing statute is 4 Geo. 4, c. 99, which established consensual composition, binding the parish and the tithe-owners for 21 years. To the certificate of composition for each parish, which was to be in a prescribed form, the Commissioners or umpire were required by section 25 to subjoin a statement of the average price of wheat or oats (whichever of the two should be considered as the corn principally grown in the county) for a seven years' period, calculated on the returns of the *Gazette*. One of the two specified grains had to be selected as the standard; the standard grain was to be the corn in the opinion of the certifying authority principally grown in the county; and the *Gazette* was to be referred to for the purpose of deciding not the standard but the price. Commissioners in adjoining parishes in the same county might arrive at different conclusions as to the grain principally grown in the county, and there might be thus different standards, as *Norcott's Case* (1) shows; but, unless corrected on appeal, each parochial certificate was final and conclusive for 21 years. The standard once fixed could not be affected by any subsequent change of cultivation. Thus, if wheat was stated in the primary certificate as the predominant corn, it would remain the standard though oats had come to displace it.

The machinery of revision provided by section 43 entirely depends on the statement in the original certificate, and the right

(1) 28 L. R. I. 185.

to vary rests on the rise or fall in prices of the particular standard grain per barrel. On any revision after the first, the section seems to direct that the calculation should be made according to the average price of wheat only. This would make revision impossible where the original standard was oats; and in *Norcott's Case* (1), the Court must have regarded the reference to wheat only as a mistake, as the judgments deal throughout with the original standard grains as in force. They do not refer to the mistake, if it be one; or to the fact that one of the grains there adopted as the standard was barley. The marginal note in *Norcott's Case* (1) as to wheat seems to be wrong.

In subsequent legislation, such as 5 Geo. 4, c. 63, section 23, altering the period of revision, and Stanley's Act, sections 1 to 6, making compositions compulsory and perpetual, subject to variation, the expression "average price of corn" occurs in a context, conclusively showing that the price of the one standard grain is meant, and not that of wheat and oats together.

At the time the Tithe Rentcharge Act was passed, there was a one-grain standard, either wheat or oats. If the standard grain, with the price, was not specified in the original certificate, there could be no revision. The certificate in some cases was framed in disobedience to the statutes, and omitted to specify the ruling grain and price – whether because the parties interested desired to avoid the risk and uncertainty of variation, or from oversight—an explanation difficult to adopt when the statutory form of certificate is looked at. The omission could have been corrected on appeal, but it was not.

The object of the final proviso in section 32 of the Rentcharge Act was to cure the omission, and the point for decision is what was the remedy supplied. Does the section put the Justices in the place of the original Commissioners, to fix the grain principally grown at that time, and its price, and to perform the duty which their predecessors had neglected to discharge? Or does it substitute a two-grain standard, and leave the question of price only to the Justices?

The section commences with a recital that compositions were

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liable to be varied with reference to the "average price of corn"—"corn" here must mean the species of grain adopted as the standard—and that it was just that the new rentcharges should be subject to a similar variation. This does not lead the reader to anticipate the introduction of any startling change of standard. The section then adopts the form of notice and procedure for revision directed by the Composition Statutes, such notice and procedure being entirely applicable to the case of a one grain standard. Then come two provisoes, on the latter of which this case must depend.

The first proviso deals with a class of certificate which states the price of "any particular species of corn." The word "any" is not very apt where the choice is limited to one of two particular grains, but counsel on both sides agree that, notwithstanding *Norcott's Case* (1), "corn" here is restricted to wheat and oats. If it embraced all cereals, and the prices of such cereals were given in the *Gazette*, the decision below would be erroneous, as, even if a composite standard was right, it should be formed by combining all the kinds of cereal grain priced in the *Gazette*, and not two only.

It is hard to read this and the following proviso without entertaining a strong suspicion that the Legislature entirely overlooked the difficulty arising from the omission to fix the standard grain. It apparently thought that the omission requiring to be remedied was that of price only. Suppose, however, the case of a certificate which named the price of a particular grain, but did not find that such grain was the corn principally grown, would such certificate be sufficient for purposes of revision before this statute? And, if not, would the statute apply?

I now take up the second proviso. It is susceptible of three possible constructions. The first is that it only applies where the standard grain has been ascertained in the original certificate, and the sole omission is that of price, which the Justices are to supply. The fatal objection to this is that—as the form of certificate shows—the omission of price involved the omission of the standard grain, and the remedial operation of the section would be reduced

(1) 28 L. R. Ir. 185.

to nothing. Accordingly, in this view, there could be no revision in the present case. The second possible construction is that the average price of the ruling grain is to be ascertained by the Justices; and, for that purpose, they must fix what was the ruling grain as well as the price. The third interpretation is that, the recovery of the original one-grain standard being treated as impossible, wheat and oats together, as corn, are bulked together, and their price alone has to be calculated. Our choice must be between these two latter views.

The proviso applies where "the price of corn" shall not be stated in the certificate. "Corn" here must signify the particular species of corn required by the statutes to be stated as the ruling grain, and not the price of wheat and oats generally. The combined price of wheat and oats never could be set out in any certificate, and such combination would have been invalid as a standard. To construe "corn" here as signifying wheat *and* oats is out of the question. On that construction, if the prices of wheat and oats were stated, the remedial proviso could not apply, yet at the same time the certificate would not afford any valid standard of grain or price. It seems clear that, just as the first proviso deals with a certificate complying with the provisions of Goulburn's Act, the second relates to a certificate failing so to comply.

Where the price of corn—in the sense above explained—is not stated, the Justices are required by the proviso to ascertain from the *Gazette* the "average price of corn," an expression always applied in the Composition Statutes, and in the earlier part of this very section, to the particular species of corn adopted as the standard, whether wheat or oats. The section does not indeed direct the Justices to ascertain the standard; it only instructs them to calculate the price from the *Gazette*. But what is the grain of which the price is to be settled? By necessary implication the duty of ascertaining the price carries with it the obligation of fixing whether wheat or oats is to be the standard grain. This is Mr. O'Leary's opinion. Sometimes it may be difficult, from lapse of time or other reasons, to determine by legal evidence what was the corn principally grown at the date of the primary certificate. It may be that in such case the Justices, like the

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Commissioners, would be entitled to decide without strictly legal proof.

The objection to the third construction—accepted by the Court below—is that it constructs a wholly novel and unheard of standard, composed of wheat and oats in combination. If it had been intended to replace a one-grain standard by a two-grain standard, one would expect to find that design clearly expressed. Yet the language employed is that familiarly used in the statutes in reference to a system where one of two grains was the standard.

A further reason for adhering to the single grain standard is that the barrel, which is the unit of measure, varies in quantity according to the grain, the barrel of wheat being twenty stone, oats fourteen stone, and barley sixteen stone.

It is true that, under Goulburn's Act, the standard grain was not that which was in fact principally grown, but that which the Commissioners considered so to be. But section 32 vests in the Justices the duty which the Commissioners had failed to perform. To fix the price they must as an indispensable preliminary ascertain what was the ruling grain. The Commissioners ought to have stated one standard grain, and its price, in their certificate, and did not. What is there in section 32 commanding the Justices to supply their default by aggregating the prices of two grains?

It is unnecessary to consider questions of evidence. The learned Judge declined to receive any evidence, or to examine what was the corn which used to be principally grown. The parties were at liberty to prove that if they could. It was an error to adopt the prices of wheat and oats together as the basis of comparison. The statute makes the price of a single grain—wheat or oats—the standard; and, jurisdiction having been exceeded, *certiorari* lies (1).

Order accordingly, without costs.

Solicitor for prosecutors: *R. Allen.*

Solicitor for respondents: *S. Jones.* A. E. R. J.

(1) Counsel for the prosecutors declined to consent to an order being forthwith made for a writ of mandamus, directing the Chairman and Justices to enter continuances and to rehear the application. On a later day, however, a conditional order to that effect was obtained by the respondents, which was made absolute in the office, no cause being shown.—[REP.].

REG. (THE INCORPORATED SOCIETY FOR PROMOTING PROTESTANT SCHOOLS IN IRELAND) *v.* THE CHAIRMAN AND JUSTICES OF CO. ROSCOMMON (1).

Q. B. Div. 1897. Feb. 22.

Tithe rentcharge—Variation—"Corn principally grown in the county"—Certificate of tithe composition stating "wheat and oats" as the corn principally grown—Order of Quarter Sessions varying the tithe rentcharge on the price of wheat and oats together—4 Geo. 4, c. 99, ss. 25, 43—1 & 2 Vict. c. 109, s. 32.

Where the original certificate of tithe composition states "wheat *and* oats" as the corn principally grown in the county for the period of seven years ending 1830, the Justices at Quarter Sessions, on an application to vary the tithe rentcharge, should proceed as if such certificate were silent on the point, and should inquire into and determine the question which of the two species of corn, wheat *or* oats, was the corn then principally grown in the county, and proceed thereon in their computation of average prices for the purposes of the application before them.

CERTIORARI. This was a motion to discharge the conditional order for a writ of *certiorari* obtained by the prosecutors, who were the lay impropriators of the rectorial tithe rentcharge in the parish of Drum, Co. Roscommon, to remove and quash an order of Quarter Sessions varying such tithe rentcharge.

The original certificate of tithe composition, dated the 6th September, 1833, stated "that the average price of wheat and oats, being the corn principally grown in the said county for the period of seven years, ending the 1st November, 1830, [was] wheat, £1 12*s.* 0½*d.* per barrel, oats, 12*s.* 11½*d.* per barrel, as extracted from the *Dublin Gazette*." The notices under sect. 43 of 4 Geo. 4, c. 99, were of application to vary the tithe rentcharge on the price of "wheat and oats."

One of the three applicant tithe-payers (Ralph O'Sullivan) was a lunatic, and, so far as he was concerned, the necessary notices of intention to apply to the Justices, etc., prescribed by

(1) Before O'BRIEN, JOHNSON, and GIBSON, JJ.

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sect. 43 of 4 Geo. 4, c. 99, were signed thus—"Dora O'Sullivan, Committee of Ralph O'Sullivan, a lunatic."

The learned Chairman and Justices of Quarter Sessions heard the application, and by their order, dated the 5th October, 1896, directed the tithe rentcharge to be varied upon a calculation of the average price of wheat and oats combined, overruling the contention of the lay impropriators that (*a*) the signature, "Dora O'Sullivan, Committee of Ralph O'Sullivan, a lunatic," was insufficient, Dora O'Sullivan, not being herself charged with the payment of tithe rentcharge, and no order of the Lord Chancellor being produced, authorising her to sign such notices on the lunatic's behalf; and (*b*) that the Chairman and Justices were bound to inquire and accept evidence of what, for the seven years ending the 1st November, 1830, was the corn principally grown in the county, wheat *or* oats, as the certificate did not specify this. The order of the Quarter Sessions set out that the Court was "of opinion that said composition was based upon the price of wheat and oats in equal proportions," and that, upon reading the order appointing said Dora O'Sullivan Committee of said Ralph O'Sullivan, they held ". . . that the signature of said notice by said Dora O'Sullivan was sufficient." Their order was unquestioned save in these two particulars, which were set out as grounds in the conditional order and the affidavit on which same was made, the latter also relying on the objection that the notices did not in fact purport to be signed by Ralph O'Sullivan.

Matheson, Q.C. (*Fetherstonhaugh* with him), for the applicants below, now moved to discharge the conditional order. They argued that the order of the Quarter Sessions was right in both respects, but finally admitted that upon the first point the Court was bound by *Reg.* (*Walsh and Everard*) v. *JJ. Cavan* (1). They also discussed the question of the sufficiency or insufficiency of the signature to the notices of application, with a view to obtaining thereon the decision of the Court, as a rehearing of the application, if the signature was insufficient, would be useless.

(1) *Supra*, p. 271.

R. E. Meredith, *Q. C.*, and *Denning*, for the lay impropriators, relied on *Walsh's and Everard's Case* (1), and further contended that the signature by Dora O'Sullivan was insufficient, and that, this being a condition precedent to the jurisdiction of the Quarter Sessions, the order was bad. They submitted that it would, however, be inconvenient, on the present motion, to have an adjudication upon this question, since it might embarrass their position in regard to an appeal in the event of a renewal of the application to Quarter Sessions.

[Upon this part of the case, reference was made to the following:—2 & 3 Wm. 4, c. 119, sect. 18; Cole on Ejectment, p. 581; Shelford's Law of Lunatics (ed. 1847), p. 250; *Re Fitzgerald* (2); *Beverley's Case* (3); *Lawrie* v. *Lees* (4); Lunacy Regulation (Ireland) Act, 1871 (34 & 35 Vict. c. 22), ss. 72 and 86; and to the procedure, in cases of disability, under the Notice to Quit (Ireland) Act, 1876, and under the 7th section of the Land Law (Ireland) Act, 1887.]

THE COURT disallowed the cause shown, and ordered that the conditional order should be made absolute, "upon the ground laid down in the conditional order 'that the order in the premises does not determine or ascertain the species of corn upon which it is based,' the Court offering no opinion as to the validity of the notice of application." No costs.

Solicitors for the applicants below: *J. Burke & Sons.*
Solicitor for the prosecutors: *H. D. Vaughan.*

A. E. R. J.

(1) *Supra*, p. 271.
(2) 2 Sch. & Lef. 437.
(3) 4 Co. 127 *b*.
(4) 7 App. Cas. 19.

Ex. Div. 1897.

Feb. 8.

DEVLIN, Appellant; HURST, Respondent.

Fishery Acts—5 & 6 Vict. c. 106, ss. 30, 36—Trout caught in close season for salmon, but before 1st October.

Section 36 of 5 & 6 Vict. c. 106, must be read as if the words "or trout" were inserted after "close season for salmon" in the commencement of the section. It is therefore not an offence to be in possession of trout after the close season for salmon but before that for trout has commenced.

Devlin, Appellant; Kidd, Respondent (Ex. Div. 20th February, 1895, unreported) stated and followed.

On the 14th December, 1896, the appellant, John Devlin, was fined 10*s.* and costs, at the Toomebridge Petty Sessions, for having in his possession, on the 21st August, 1896, at Toome, in the Petty Sessions District, trout, caught by net during the close season for catching salmon or trout by net. The appellant did not dispute having been in possession of the trout on the day in question, but the point made on his behalf was, that as the close season for trout (5 & 6 Vict. c. 106, s. 30), did not commence until the 1st October, he had not incurred any penalty under section 36, on its true construction. The close season for salmon in the district (Coleraine) commenced on the 20th August.

The Justices stated a case for the opinion of this Division.

Morphy, for the respondent, was called on by the Court, the appellant's counsel being absent:—

The prosecution was under sect. 36 of 5 & 6 Vict. c. 106, which is for the protection of the salmon fisheries, and to prevent the drawing of nets for trout in salmon-frequented waters during the close season for salmon, as by so doing salmon would probably be caught. The section casts on any person having trout in a district in the close season for salmon the onus of showing that they were not caught by net in salmon-frequented waters. Section 30 of the Act, and sect. 45 of the 13 & 14 Vict. c. 88, recognize the prohibition in sect. 36. The onus is similar

to that cast on persons exposing salmon for sale in England during the close season for salmon, by 36 & 37 Vict. c. 71, sections 19 and 20, which casts on the person having the salmon the onus of showing that the fish was killed beyond the limits of the Act: *Price* v. *Bradley* (1).

Henry, Q.C., for the appellant:—

Section 36 of 5 & 6 Vict. c. 106, must be read as if the words, "or trout," were inserted after the word "salmon," which occurs at the beginning of the section, otherwise the absurdity would result that as the close season for trout does not begin until 1st October, while the close season for salmon begins on 20th August, it would, therefore, be lawful to take trout under the statutes between 20th August and 1st October; but if the conviction be right under sect. 36, their possession would be an offence. See *In re Wainwright* (2); *Quin* v. *O'Keeffe* (3). The same question was decided in this Court in *Devlin, Appellant; Kidd, Respondent*, on 20th February, 1895 (4).

P. C. Gaussen, for the conservators of the Bann Fishery.

PALLES, C. B.:—

The case is determined by the decision of the Court in the case of *Devlin, Appellant; Kidd, Respondent*, and the question should not be agitated again in this Court, even though differently constituted.

ANDREWS and MURPHY, JJ., concurred.

(1) 16 Q. B. D. 148. (2) 1 Phil. 258. (3) 10 Ir. C. L. R. 393.

(4) This case was almost exactly identical, the appellant being charged with the possession of nineteen trout on the 20th September, 1894, and fined £9 10*s.* and costs. The Justices stated a case under a mandamus from the Queen's Bench Division, and the question was argued before the Exchequer Division, when the conviction was quashed, with costs. The Registrar, Mr. H. V. Yeo, at the request of the Court, produced his memorandum book, containing a note to the effect that Mr. Justice Andrews delivered the judgment of the Court, holding that the section must be construed as if the words "or trout" were contained in it after the words at the commencement thereof, "close season for salmon."—[REP.]

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DEVLIN, *Appellant*; HURST, *Respondent.*

The following is the curial part of the order:—

"ON reading the said case, and the case stated wherein Devlin was appellant and Kidd respondent, heard and decided by this Court on the 20th of February, 1895, and it appearing to the Court that the said last mentioned case was determined by this Court upon the true construction of the 36th section of the 5 & 6 Vict. c. 106, that the words therein should be read 'salmon or trout.'

"The Court being of opinion on this case stated that the said Justices were incorrect in point of law in their determination as therein mentioned doth quash the conviction of the said Justices, with costs, and doth order that the said respondent do pay to the said appellant his costs of the said case and argument thereon when taxed and ascertained."

Solicitors for the appellant: *Glover and M'Guckin.*
Solicitor for respondent: *The Chief Crown Solicitor.*
Solicitor for the Bann Fishery Conservators: *J. K. Currie.*

J. P. B

Q. B. Div. 1896.

Nov. 30.

HOSFORD, APPELLANT; MACKEY, RESPONDENT (1).

The Fishery (Ireland) Act, 1848 (11 & 12 *Vict. c.* 92), *ss.* 22, 28—*Using fixed net without licence—Licence for year—Calendar year—Master and servant—Liability of fishery owner for criminal act of his servant, done contrary to his orders.*

The respondent, owner of an eel-weir in the Upper Shannon, was prosecuted before Justices, under the Fishery (Ireland) Act, 1848, sect. 22, for fishing same on the 11th January, 1896, without being first duly licensed. He had in October, 1895, taken out the usual yearly licence for the weir, and contended that, under this licence, he was entitled to fish the weir until the end of the fishing season, viz. the 31st January following,—the open season for eel fishing in the Upper Shannon extending from the 1st July to the 31st January. The weir had been fished on the date in question by the respondent's servants; but the respondent proved to the satisfaction of the Justices (who dismissed the case) that he was himself absent at the time, and had, before leaving, given express directions to his servants not to fish the weir after the 1st January. On Case Stated,—

Held, that the respondent was not liable for the illegal acts of his servants

(1) Before O'BRIEN, JOHNSON, and HOLMES, JJ.

done contrary to his orders, and that the Justices were correct in dismissing the complaint.

Held also, that the annual licences for which provision is made in the Fishery (Ireland) Act, 1848, ss. 22, 28, are licences for the calendar year for which same are issued.

CASE STATED pursuant to 20 & 21 Vict. c. 43, by the Justices of county Limerick, sitting at Castleconnell Petty Sessions, on the 11th May, 1896, in the matter of a complaint, heard before them on that date, in which Edward H. Poe Hosford was complainant, and Anthony Mackey defendant, alleging that, on the 11th January, 1896, at Castleconnell, the defendant, for the purpose of taking eels, used thirty-seven gaps or eyes subject to licence duty in his weirs in the river Shannon, at Castleconnell, without the same being first duly licensed.

The Justices had in the first instance heard the complaint, and had dismissed the case on the merits, with costs, refusing the prosecutor's application to them to state a Case, on the ground that it was frivolous, as the identical point had been already decided by His Honor the County Court Judge. The prosecutor thereupon applied for and obtained an order for a writ of mandamus directing the Justices to state a Case. This order was obtained on the affidavit of the prosecutor, in which he stated, that at the hearing at Petty Sessions, it was proved, and not denied, that on the date in question, thirty-seven gaps or eyes in the defendant's eel-weirs at Castleconnell were fished by the defendant's men, and eels captured therein and transferred to the defendant's tanks, and that on the said date no licences for the said weirs or gaps had been issued for the year 1896; that, on behalf of the defendant, a letter was put in evidence purporting to be written by the defendant to his foreman, instructing him to set the nets but to capture no fish; and that it was contended for the defendant that his licence for 1895, for these weirs, entitled him to fish the weirs up to the end of the "fishing season" (*i. e.* the 31st January, 1896), and further, that he was not liable for the acts of his servants done contrary to his orders. This affidavit then proceeded to state that the Justices, holding themselves to be bound by the decision of the County Court Judge of Limerick in a similar case, had dismissed the complaint, and had refused to state a Case

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HOSFORD, *Appellant*: MACKEY, *Respondent.*

when required to do so. The prosecutor, accordingly, asked the Court for an order directing the Justices to state a Case on the following points:—1. Whether a licence for a year entitles the holder to fish an eel weir till the end of the season, which expires after the commencement of the ensuing calendar year? 2. Whether the lessee or proprietor of an eel weir is liable for the illegal acts of his servants? If so, whether he is liable for illegal acts done against his orders? And does such proprietor or lessee, by availing himself of such acts of his servants by accepting and dealing with eels illegally taken, ratify and adopt the illegal fishing so as to render himself liable to prosecution? In obedience to this order, the Justices stated the present Case for the opinion of the Queen's Bench Division.

The Case, after referring to the matters already mentioned, set out that, on the 11th January, 1896, at 7.30 to 8 o'clock in the morning, thirty-seven gaps, or eyes or nets, in the eel weirs at Castleconnell, of which the defendant was lessee and occupier, were fished by several of the defendant's servants. The eels were taken out of the nets and put into the defendant's tank near the shore; subsequently "boxes belonging to the defendant, supposed to contain eels, were observed at Castleconnell Railway Station, addressed to fishmongers in London." The fishing period or open season for the taking of eels in the river Shannon commences on the 1st of July, and terminates on the 31st of January following. No licences to fish for or take eels had been granted to the defendant for the year 1896, but it was admitted that the defendant had taken out licences for the several gaps, eyes, or nets, in the preceding month of October, 1895.

The defendant contended that the licence, obtained in 1895, was valid for the fishing season from 1st July, 1895, to the 31st January, 1896, and also that he was not liable for the criminal acts of his servants done contrary to his express directions, he having by letter, dated 29th December, 1895, expressly ordered his foreman that none of the nets were to be left in fishing order. The defendant himself was absent from Castleconnell from the 29th December 1895, until the evening of the 11th January, 1896, and the Case stated that "it was proved" that "the eel weirs were fished contrary to the directions of the defendant as

conveyed in this letter. No evidence was given that the defendant ratified the fishing. As to the practice in regard to taking out these licences, the records prior to 1883 have been lost, but, from the books of licences for 1883 and subsequent years, it appeared that no licences were ever issued before the month of July in any year—they were generally issued in the months of October and November—except in one instance, when a licence had been taken out in January, 1894, for one gap.

The Justices referred to a similar prosecution instituted by the same complainant on the 3rd January, 1896, against the same defendant, at Castleconnell Petty Sessions, for a similar offence alleged to have been committed on the 8th of January, 1896, on the hearing of which, no evidence being produced for the defence, they had imposed a fine and costs. From this conviction the defendant had appealed to the County Court Judge, who had admitted in evidence the letter of 29th December, and reversed the order appealed against, holding that the defendant was not liable for the criminal acts of his servants committed contrary to his directions and in his absence, but declining to express any opinion on the other questions raised. The Justices stated that they felt themselves bound by this decision, and for that reason dismissed the complaint. They now, in obedience to the writ of mandamus, submitted the present Case for the opinion of the Court upon the question whether they were correct in point of law in their determination.

Ronan, Q.C. (*Brereton Barry* with him), for the prosecutor in the Court below (1):—

There are two questions raised in this case, the first being whether the defendant under the circumstances stated is liable for what was done, assuming that the defendant's licence expired on the 31st December, and not, as he contends, on the 31st January in the year following. We are forced to admit, as the Justices have so found, that the eel weir was fished by the defendant's servants contrary to his directions, as contained in the letter of the

(1) For the convenience of counsel, senior counsel were permitted to open the case.

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29th December, and that he did not subsequently adopt their acts. Section 22 of the Act of 1848 (11 & 12 Vict. c. 92), under which the complaint was framed, imposes a penalty upon any person who "shall use or erect any engine, net, instrument, or device whatsoever," subjected to licence duty in any year without the same respectively being duly licensed under the provisions of this Act. The provisions of the Act would be frustrated if a fishery owner were not responsible for illegal fishing by his servants. Its policy and object was the protection of the fish for the benefit of the community. The enactment, therefore, is not to be construed with the same strictness against the prosecutor as if it were a penal Act. The proceeding, though criminal in form, is in reality only a summary mode of protecting and enforcing civil rights. The authorities are cited and discussed by Mr. Justice Wright in *Sherras* v. *de Rutzen* (1). There is "a presumption that *mens rea*, a guilty intention or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence, but that presumption is liable to be displaced either by the words of the statute creating the offence, or by the subject-matter with which it deals": *Davies* v. *Harvey* (2), *Reg.* v. *Stephens* (3), *Rex* v. *Medley* (4), *Barnes* v. *Akroyd* (5), *Morden* v. *Porter* (6), *Lee* v. *Simpson* (7), and *Hargreaves* v. *Diddams* (8); see also *Mullins* v. *Collins* (9), *Cundy* v. *Lecocq* (10). There is here an absolute prohibition, and thus cases like *Somerset* v. *Hart* (11), and *Somerset* v. *Wade* (12), for "suffering" or "permitting" violations of the Licensing Acts, are distinguishable. The latest case, *The Commissioners of Police* v. *Cartman* (13), before Lord Russell of Killowen, C. J., is a direct authority in favour of the prosecutor. The remarks of the learned Lord Chief Justice as to the policy of the Licensing Act of 1872 apply with equal force to the Irish Fishery Act of 1848, and in the case now before

(1) [1895] 1 Q. B. 918.
(2) L. R. 9 Q. B. 433.
(3) L. R. 1 Q. B. 702.
(4) 6 C. & P. 292.
(5) L. R. 7 Q. B. 474.
(6) 7 C. B. (N. S.) 641.
(7) 3 C. B. 871.
(8) L R. 10 Q. B. 582.
(9) L. R. 9 Q. B. 292.
(10) 13 Q. B. D. 207.
(11) 12 Q. B. D. 360.
(12) [1894] 1 Q. B. 574.
(13) [1896] 1 Q. B. 655

the Court, as in the case cited, the servant was beyond all manner of question acting within the scope of his authority. The fact that the master had given a direction to the contrary effect can make no difference in either case.

As to the second matter at issue, year must mean calendar year. The penalty in sect. 22 of 11 & 12 Vict. c. 92, is for using a net "in any year, without being duly licensed for such year under the provisions of this Act," *i.e.* section 28; and nothing could be more express than the wording of section 28, "the year for which such licence shall issue" is to be printed thereon, and such licence shall "be only good and valid for the year, district, and purpose, for which the same shall be issued, and for no other," and any party "using the same for any other year" shall be liable to a penalty. An illegal practice of allowing the licence duty to remain unpaid until July, or even later, cannot over-ride the express enactment of the section. Where the Legislature wished to mention "season" it did so, as in section 47 of the Act of 1863 (26 & 27 Vict. c. 114).

Bushe, Q.C., and *Redmond Barry*, for the defendant in the Court below:—

As to the second point, "year does not always and necessarily mean calendar year." The meaning must depend on the subject-matter in connexion with which the word is used. Here it cannot mean the full twelve months, but only certain months, that is to say, the "open season for eel fishing," from the 1st July to the 31st January. In section 33 of the Act of 1842, the word "year" cannot possibly be read as "calendar year." [HOLMES, J.: In that section it would seem to me that it does mean "calendar year."] The admitted and uniform practice has put a possible and reasonable interpretation on the section, and the Court should not disturb it: *Grant* v. *Maddox* (1).

[Counsel admitted that they could not press the point further.]

As to the second question, guilty knowledge—knowledge or approval of the servant's acts—was essential. Except in cases under the Licensing Acts, where the use of the word "know-

(1) 15 M. & W. 737.

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ingly" in some sections emphasises its omission in others, and shows that in those others it was not intended that knowledge should be an essential ingredient in the offence—no case can be produced where a master has been held to be criminally liable for the acts of his servants not directed to be done, nor done in the ordinary course within the scope of his employment, but done contrary to the master's express command. The decisions upon public nuisances are totally distinct, and are in terms based on the assumption that an indictment for a public nuisance is to all intents and purposes a civil not a criminal proceeding: see *Reg.* v. *Stephens* (1). If, in a case like the present, it had been proved that the employer had absented himself *mala fide*, or that the letter forbidding the act was merely a cover, no doubt the master would be liable under the section. This, however, is not suggested in the present case. [Counsel discussed the cases already cited, relying also on *Bond* v. *Evans* (2); *Chisholm* v. *Doulton* (3); *Newman* v. *Jones* (4).] It would be a great hardship if, because a stranger, or a servant, fished contrary to his master's orders, the master's property should be confiscated. [They also referred to *Davies* v. *Harvey* (5); *Fitzpatrick* v. *Kelly* (6); *Rex* v. *Marsh* (7); *Reg.* v. *Bishop* (8); *Commissioners of Police* v. *Cartman* (9).]

Brereton Barry, in reply:—

The fallacy in the defendant's arguments on the first point arises from taking "the fishing season" as the year; "year" means calendar year, in which, as far as regards eel-fishing, the period from January 31st to 1st July is appointed as a close season during which all fishing is prohibited.

[The Court intimated that counsel need not deal further with this branch of the case, as they were satisfied that year must mean calendar year.]

As to the other question, the preamble to the Act of 1848 and

(1) L. R. 1 Q. B. 702.
(2) 21 Q. B. D. 249.
(3) 22 Q. B. D. 736.
(4) L. R. 17 Q. B. 132.
(5) L. R. 9 Q. B. 433.
(6) L. R. 8 Q. B. 337.
(7) 2 B. & C. 717.
(8) 5 Q. B. D. 259.
(9) [1896] 1 Q. B. 655.

the circumstance that the penalties recovered are applied to a *quasi* public purpose—the purpose of the conservators to whom the interests of the community in the particular district are confided—go to show that the master is liable. The present case is exactly in line with the decisions upon nuisances: *Reg.* v. *Stephens* (1); *Rex* v. *Medley* (2).

O'BRIEN, J.:—

For myself, I entertained at one time much doubt upon the question here raised, and rather was inclined to think that this case fell within the somewhat wide and large class of cases where it is necessary from one reason or another to identify the employer in all the consequences with the persons whom he employs. I am, however, constrained to come to the conclusion that the defendant cannot here be held liable for the illegal acts of the person in charge of the weir in regard to which the summons was brought. The decisions are various, and the general propositions to be gathered from them would seem to show that the rule of *mens rea* does not necessarily extend to cases where from reasons of public policy the law has required certain acts to be done or regulations to be observed, and this distinction appears to be extended to a certain class of revenue enactments where the objects of the excise and the public revenue are considered to be of such paramount importance that no excuse for their infringement upon the ground of want of knowledge is allowed. Upon the whole, after listening very carefully to the cases which have been discussed at the bar, the question resolves itself simply into this:—What is the effect of a prohibition imposed on a servant by his employer? The only case in which this precise element has been excluded is the recent one before Lord Russell of Killowen, who certainly in his judgment rather restricts the nature and effect of his decision to the general policy of preventing a violation of the law where if one proceeding be not open no other remedy exists, and where if the employer be not liable no action can be taken against any other person. In the instance of a violation of a regulation as to the conduct of a public-house, it is only the licensee who can be made

(1) L. R. 1 Q. B. 702. (2) 6 C. & P. 292.

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HOSFORD, *Appellant*; MACKEY, *Respondent*.

answerable; here, any person who fishes without a licence can be made to answer personally, though the effect of the infliction of a penalty upon the servant may be *nil*. But it occurs to me that if the general principle is not admitted here, an employer could not protect himself from criminal responsibility by any command to his servant not to do the act complained of. This is one of those cases in which this Court can offer no remedy, and where the ends of justice must depend for their fulfilment upon the legal sagacity of the original tribunal. Upon the whole I think that the decision of the magistrates must be left untouched.

JOHNSON, J., concurred.

HOLMES, J.:—

I wish to say that we are obliged to approach this case on the assumption that the direction given by the defendant to his servant was given in perfect good faith—that the owner of the fishery on the last day of the year was desirous that the fishery should be fished no longer, and that all he could do, short of dismissing the servant, was done to prevent the weir being fished after the 1st of January. Starting upon this assumption, which is the basis upon which the Case is framed, I agree that the Justices were right in declining to convict.

Solicitor for appellant: *W. E. Counihan.*
Solicitor for respondent: *J. Blackall.*

A. E. R. J.

MURPHY *v.* GREAT NORTHERN RAILWAY CO. (1).

(1896. No. 8615.)

Q. B. Div. 1897. Jan. 22, 25, 27. *Appeal.* March 11, 12.

Negligence—Master and servant—Liability of master—Act of servant resulting, through intervening act of third parties, in personal injury—Railway Company.

A railway porter wheeled a barrow with luggage thereon to a side entrance to the defendants' station at Derry, and left it stationary close to the top of some steps leading down to the public footpath outside. Some badge-porters, licensed by the Corporation of Derry, but not employed by or subject to the control of the defendant Company, rushed up the steps—as was usual when the constable whose duty it was to keep them off the platform and to maintain order amongst them was absent, as he was on this occasion—and, in a struggle for the luggage, upset the barrow and trunks. These tumbled down the steps and injured the plaintiff, a passenger, who was waiting on the footpath for his luggage to be brought out.

Held, that, on these facts, the plaintiff (who had sued the defendants for the negligence of their servant, and whose case had at first been that the porter had himself wheeled the barrow over the steps) was not entitled to recover.

NEW TRIAL MOTION.

The action, which was brought to recover damages for the negligence of the defendants' servant in wheeling and managing a truck or hand-barrow with trunks thereon, was tried before Mr. Justice Murphy and a special jury on the 15th and 16th December, 1896. The more material portions of the evidence given at the trial are in substance as follows:—

The plaintiff, J. J. Murphy, a passenger in a train of the defendant Company, deposed that he alighted at their station at Derry, and, after pointing out his luggage to a hotel servant, proceeded along the platform towards the main entrance. He then gave his handbag and writing-case to one Donnelly, a badge-porter whom he knew. These badge-porters get a licence from the Corporation

(1) Before O'BRIEN, HOLMES, and GIBSON, JJ.

Q. B. Div. 1897.

MURPHY v. GT. NORTHN. RAILWAY CO.

of Derry to act as porters in the city; a good many of them attend at the railway station, and take from or to it any luggage that may be given to them by passengers; they are not in the service of the railway company, and have no right to enter on the platform of the station. The plaintiff went out through the main entrance, and then round to the side entrance or opening, where the luggage is taken out. This is a side exit from the platform, some ten feet in width, leading down by three steps to the public footway outside the station. It was here the badge-porters usually assembled. He found Donnelly there fixing on his barrow the last portion of his luggage. Donnelly had left the handbag and writing-case inside the station; the plaintiff bade him fetch them, and waited opposite the steps on the footpath, about two feet from the steps. Donnelly came back; the plaintiff turned to walk away; just as he turned he heard a shout, and received a violent blow between the shoulders, and then saw on the footpath close to him two large trunks and a railway truck or barrow. Cross-examined, he stated that he saw at least one other badge-porter besides Donnelly on the platform; he saw a railway truck with boxes on it on the platform, and two men, badge-porters, fighting for the inner trunk. This was just before he was struck; there were four or five other badge-porters there at the time. Donnelly was not joining in this; some one was holding the railway truck.

Constable Lapper, R.I.C., was at the station close to the steps, and saw a railway truck being wheeled towards the opening; there were four large trunks upon it, two underneath, two above; "the railway porter pushed it towards the steps; generally the handle is towards the steps; the barrow was pushed close to the steps, say two or three inches from the edge of the first step; the porter then stopped, rested his hand on the shaft of the barrow, and looked up the platform, apparently to see if the owners of the boxes were coming after him; in a minute or so after this the tilt-up occurred; I did not see what caused it; (cross-examined) just at the moment I was not looking towards the footpath; it must have been some one from outside interfering with the barrow that tilted up the barrow—some of the badge-porters rushing at or for the luggage on the barrow that tilted it up."

Donnelly, the badge-porter, stated that he saw the barrow pushed towards the steps, not in the usual way; it was not off motion till it was thrown down; it tumbled right down, the shafts in the air, and the plaintiff was struck; the railway porter had hardly left the barrow out of his hand when the first box was taken off it; there were then some three or five badge-porters around it; the duty of the station constable is to keep the badge-porters off the platform; the barrow was close to the steps, one and a half or two inches from the first step. (Cross-examined.) Witness saw a lot of badge-porters take a box off the truck; one was first taken off; "then a lot were pulling at the others"; Maginnis, the station-constable, was not there at the time; when he is not there the badge-porters rush in.

Ross, another badge-porter, stated that the barrow was wheeled to within three inches of the steps, and was still in motion when it tilted over; some of the badge-porters were walking along by the barrow for four or five yards before it came to the top step, but did not touch the boxes on it.

For the defendants, Daniel Mooney, the railway porter who wheeled the barrow in question to the opening, stated that he had been in the defendants' employment for some years; he worked generally in the goods store; this barrow had four large boxes on it; he left it at a slant, steady and stationary, near the steps; he kept his hand on one of the shafts; six or seven badge-porters began to pull and haul at it, and pulled it down; one box had been taken off by a badge-porter while the barrow was on the platform; then six or seven began to struggle for the other boxes and tilted the barrow over the steps; the barrow was partly sideways towards the steps. (Cross-examined.) He was wheeling the truck for the first time that morning at the station; he had been put to this work, and had been told to pull the barrow after him; he had pulled this barrow after him for some time, and then pushed it before him. (Re-examined.) He had been wheeling barrows very often in the goods store, constantly; he was nineteen years old.

Wm. Bradley, a car-driver, saw some seven badge-porters in front of the opening; saw a porter bringing a barrow along the platform; one badge-porter got on the platform before the others,

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and took off one box; then the others got on the platform and made for the barrow as they usually did when the constable was not there; they made for the truck, rapidly began pulling at it, and down it came; the plaintiff was sideways to the barrow; witness did not see anything strike the plaintiff; the plaintiff went off towards the street as if nothing had happened to him; when a barrow is at the steps the badge-porters run in to take off the luggage when the station constable happens to be absent.

Further evidence was given on the part of the defendants corroborating the account given of the occurrence by Mooney and Bradley. The evidence on both sides as to the extent of the plaintiff's injuries is omitted.

The learned Judge in his report, from which the above summary of the evidence is taken, stated that he informed counsel of the question which he would leave to the jury, telling them that if the badge-porters by their misconduct in rushing up the platform and dragging at the boxes on the truck had caused it to tumble down the steps, the defendants could not, in his opinion, be held liable for the injuries sustained. *Wylie*, *Q.C.*, for the plaintiff, asked him to submit to the jury the questions —Whether Mooney was not guilty of negligence in bringing up the barrow close to the door in the way admitted by him; whether the Company was not guilty of negligence in not having the constable at the door to control the badge-porters, and whether the Company was not guilty of negligence in employing a boy so young to bring the barrow to the door where a rush of badge-porters might have been reasonably expected. The Judge declined to do so, and left to the jury the following questions, telling them that if they answered the first in the affirmative they need not enter upon the question of damages, but if they were of opinion that Mooney, as Donnelly and Ross swore, shoved the barrow so close to the steps that it went over from the motion he gave to it, they should then say what damages they would give to the plaintiff. The questions submitted were—"1. Was the barrow upset by the badge-porters rushing up the steps and pulling at the trunks that were on the barrow? (*Answer*—Yes.) 2. If you are of opinion that this was not the cause, and think that

Mooney wheeled the barrow over the steps, then say what damages you award to the plaintiff." The learned Judge expressed his opinion that the finding of the jury was correct.

Counsel for the plaintiff now moved for a new trial on the ground of misdirection in directing that—no matter whether the defendants were guilty of negligence in employing the boy Mooney to wheel the barrow to the door, or in having no railway official at the door to control the badge-porters, or whether the boy Mooney was guilty of negligence in placing the barrow at the door as he did, or whether the railway constable was guilty of negligence in not being present to control the badge-porters—if the boy Mooney brought the barrow to the door, and rested it there, and if it was the acts of the badge-porters that caused it to fall down the steps, the defendants were not responsible; and on the further ground that material questions of fact were not submitted to the jury by the learned Judge though requested to do so.

Wylie, Q.C., and *Henry, Q.C.* (*Osborne* with them), for the plaintiff.

G. Wright, Q.C., and *Campbell, Q.C.* (*R. F. Harrison* with them), for the defendant Company.

[The following authorities were cited during the argument:—*Lynch* v. *Nurdin* (1); *Williams* v. *Eadie* (2); *Engelhart* v. *Farrant and Lipton* (3); *Clark* v. *Chambers* (4); *Halestrap* v. *Gregory* (5); *Patterson* v. *Mayor of Blackburn* (6); *The Bernina* (7); *Matthews* v. *London Tram Company* (8); Beven on Negligence (2nd edition), p. 112, and cases there quoted; *Cannon* v. *Mid. Gt. W. Ry. Co.* (9); *Sharpe* v. *Powell* (10); *Jackson* v. *Metropolitan Railway Co.* (11).]

Cur. adv. vult.

(1) 1 Q. B. D. 99.
(2) 10 *Times'* L. R. 41.
(3) 13 *Times'* L. R. 81; [1897] 1 Q. B. 240.
(4) 3 Q. B. D. 327.
(5) [1895] 1 Q. B. 561.
(6) 9 *Times'* L. R. 55.
(7) 13 App. Cas. 1.
(8) 58 L. J., Q. B. 12.
(9) 6 L. R. Ir. 199.
(10) L. R. 7 C. P. 253.
(11) 3 App. Cas. 193.

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Jan. 27.

O'BRIEN, J.:—

In an action for personal injuries, the questions left to the jury were confined to the point, whether what happened was owing to the direct action of one of the Company's servants by pushing a barrow loaded with luggage over steps leading to the street, or to the disorderly conduct of certain public porters for whom they were not responsible. The jury found that the latter was the cause. Upon a motion for a new trial, the case made is that the Company were guilty of negligence through the fact of the barrow having been placed in such a situation, and so near the steps, that it was liable to topple over by such an accident as occurred, and that the answer to the question that was put therefore did not determine the matter. This case was met by the argument founded on what was called the course of the trial, namely, that it was inconsistent with the other form of negligence on which the plaintiff was alleged to have relied—and it is necessary to take notice of an objection to which justice requires the Court sometimes to give effect, even without admitting any question of terms, that a party is concluded by the course which he adopts at the trial—that it is not always merely an element affecting the probability whether another case was capable of being truly made, but a ground for not putting the defendant to the peril and cost of a new trial to determine an issue that could have been tried at first. In this instance it is certain that an adroit advocate, taking upon him to prove that the accident was caused by the servant of the Company himself rolling the truck over the steps, would observe a discreet silence concerning any evidence that the truck was stopped before the occurrence, and would avoid attracting notice to it by over-zealous cross-examination. And, on reading the report, I must come to the conclusion that counsel for the plaintiff have not made out that they committed the fatal error of developing too strongly in the course of the evidence a view of the facts inconsistent with their main point that the porter pushed the truck over the steps, behind which lay a question of law of unknown perils. If, indeed, means had been adopted to mask a certain view of the facts, or to put it out of notice completely until the opportunity of meeting it in evidence was gone, that would, perhaps, be considered a fatal objection against submitting such a

view to a new trial. However, that opportunity is not lost until the verdict is delivered; and it is the undoubted right of a party to have any question that arises upon the evidence presented to the jury, and he is entitled to extract his case even from unexpected and contradictory evidence. For witnesses, even if it happen that they are sometimes tutored, cannot, in law, be supposed to be under the control of the party, so that he is identified with their statement as limiting the case he intends to make. There are no means of gathering from the report whether the Judge refused to put the first of Dr. Wylie's questions because it was contrary to the case made at the trial, or because he considered it raised no ground of liability. In form the question itself is open to the criticism that it does not present quite exactly the point now relied upon, that the truck was brought too close to the edge of the steps, but it includes, even in terms, the circumstance of the truck being close, as well as being placed in the wrong direction; and too great exactness could not be expected in objections prepared in the hurry of the last moment, and in the incidental differences between the Judge and counsel. I take it that the Judge declined to put the question because he considered it immaterial in law.

We have, therefore, to consider the point of law, which raises the question, often discussed and extremely embarrassing in its application, as to how far the liability of a party for negligence is affected by the concurrence of a third person in producing the injury—in this case, whether the fact of the barrow being wheeled too near the steps, and toppled over by the street porters, makes the Company liable. For the answer of the jury to the question put to them, even if open to verbal criticism, was necessarily a finding that the act of the badge-porters, to whom the occurrence was attributed, was a negligent and improper one, and the answer could not be construed as meaning merely agency without negligence, because the evidence of the plaintiff himself was, that it was in a fight between them for the possession of the luggage that it was thrown down and hurt him. In determining a matter of negligence, from which the question of degree cannot be excluded, there is obviously great difficulty in laying down a rule that will cut at any point the line of responsibility for consequences to which a third person contributes. Some kinds of

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negligence may be very slight, and some may be very gross, and the distinction could not be without effect upon the liability. Loaded fire-arms, for instance, may be left in some places without obvious risk, and in others with the most imminent danger, and may be fired off innocently in either. Positive law, metaphysical ideas of agency, and the moral quality or reasonableness of the act, all enter into the consideration of the question. And as to the decisions, it is not easy to trace a line of principle that will pass in and out of the cases, and follow the irregularity of their circumstances without coming into conflict with any of them. The rule quoted by Mr. Campbell from the American decisions—that the break in the continuity of the action in which different persons join, is the test—while applicable to several cases, will not meet all, as, for example, the case of the child moving the horse which was left unattended in the street (*Lynch* v. *Nurdin* (1)), or of the person moving the obstruction from the middle of the roadway to the side (*Clark* v. *Chambers* (2)), or of the two persons sent with the parcels van, one to deliver and one to drive (*Engelhart* v. *Farrant* (3)), in all of which there was an interval, and yet the defendant was held liable; while *The Bernina* (4) was not a case of initial, but of simultaneous negligence. I consider the true determining rule to be this—which measures off at once the degree as to negligence or no negligence of the act itself complained of, and, in the conclusion, agrees with the ultimate result of liability or non-liability—that the defendants can only be made liable through the acts of third persons which happen in the ordinary course of the business which they carry on, and that they are not responsible for consequences that happen through the negligent or improper conduct of such persons. To take the examples suggested in the argument, if the barrow had been left at the top of the stairs, where it might be pushed down by persons passing in or out of the station in the ordinary way, the Company might be held liable. The state of things that can be reasonably foreseen is a necessary condition of the blame that must always enter in some degree into the idea of actionable negligence; and there is no rule of law

(1) 18 Q. B. D. 29.
(2) 3 Q. B. D. 327.
(3) [1897] 1 Q. B. 240.
(4) 13 App. Cas. 1.

that obliges persons to provide against the possible misconduct of others.

For these reasons I am of opinion that the question required to be put by the plaintiff's counsel could not, however answered, have resulted legally in the liability of the defendants, and that therefore the verdict cannot be set aside.

HOLMES, J. :—

No objection can be taken to the proposition of law upon which the plaintiff's counsel rest their case. If a man, by the negligence of himself or his servants causes injury to person or property, he may be held liable, although it appears that the injury would not have happened without the intervention of some other human agency. Instances illustrating this proposition are to be found in the authorities cited during the argument, and many others might be suggested. For example, I entertain no doubt that if a careless or inexperienced railway porter places a truck or barrow of luggage on an incline or in some similar insecure position, where the accidental contact of a passer by, or the removal of the luggage in the ordinary course of business, is likely to put the vehicle in motion, and if some one is struck and hurt by it after it has received an impetus from one of these causes, the Railway Company may be legally responsible ; at the least, there would be evidence of negligence ; but of course it would be necessary to consider all the other circumstances before determining the question of liability.

It is generally easier to formulate a legal proposition than to apply it to a particular state of facts. In the present case it is admitted that there was an issue for the jury : and what the Court has to decide is whether their finding on the only question left to them put an end to the action. The plaintiff's counsel present an alternative view of the defendants' negligence. They say that the porter, by his want of skill and care either actually drove the barrow down the stairs leading to the public footpath, or so poised it on the edge of the topmost step that the removal of the trunks in the usual manner had the effect of sending it down. They say that in either aspect of the case there was evidence of negligence, and that the jury might have accepted one or the other. They then argue

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that the course taken by the Judge had the effect of withdrawing from the jury the second alternative, and that consequently there was a mistrial.

Now, although the only two witnesses called by the plaintiff who saw the accident attributed it to the direct and immediate agency of the porter, I think that, taking the evidence as a whole, a jury might legitimately draw from it the inference that the plaintiff's injury was caused in the second way suggested by his counsel. But, in considering the meaning and appropriateness of the Judge's question it is necessary to look at the defendants' case. Their witnesses gave an account of the occurrence that freed the porter from responsibility. They proved that he brought his barrow to a stand, that he placed it in a position that allowed the trunks to be removed safely in the usual way, and that in point of fact one of them was removed without accident, but that there then ensued a struggle between seven or eight badge-porters to get hold of the luggage, in the course of which the barrow was pulled or projected down the steps—a thing that might have happened whether the barrow had been standing within three inches, six inches, or a foot, of the edge of the platform. This account is equally inconsistent with either of the views presented by the plaintiff; and the object of the Judge's question was to ascertain whether the jury accepted or rejected it. It is not always possible to evolve from the evidence given at a trial a single, simple, and definite issue, the result of which will settle the action. But, when this can be done, it is much more satisfactory to confine the attention of the jury to it than to embarrass them by legal propositions and definitions which are often misunderstood. It seems to me clear that whether the railway porter was guilty of negligence or not depends upon the truth of the account of the transaction given on behalf of the defendants. If the badge-porters upset the barrow, not in removing the luggage in the ordinary course of business, but in a struggle between themselves to get possession of it, the railway porter is absolved from the charge of negligence brought against him, no matter in what way such charge is presented. Therefore the jury, by affirming the defendants' version of the transaction, refused to adopt either of the alternatives offered them by the plaintiff. Why, then, is effect not to be given to this finding?

The only ground for asking the Court to disregard it is the language used by the Judge when directing the jury on the subject of damages. No doubt he told them in effect that a negative answer to the question put to them would necessarily imply that the railway porter upset the barrow himself, and I do not think that this would be the only inference. But a misdirection that does not affect the result is unimportant: and it is impossible to believe that the minds of the jury could have been influenced in considering the very distinct issue of fact upon which they found, by a casual observation of this kind. It really meant no more than that an answer in the negative would be a verdict for the plaintiff, and that in such event damages were to be awarded.

To prevent misunderstanding, I desire to mention another matter. At the trial and during the argument reference was made to the absence of a railway policeman whose duty is said to have been to keep order amongst the badge-porters. A Railway Company is bound to take reasonable measures to protect its passengers from such kinds of disorder as are likely to arise on their premises in consequence of their mode of conducting business; but where the absence of such precautions is relied on as evidence of negligence, it ought to be distinctly raised and proved. No cause of action of this kind is stated in the pleadings, and I asked Mr. Henry whether he relied on want of supervision as substantive negligence. His candid reply was that he did not, but that he used the customary employment of the policeman to show that the defendant Company knew what kind of men the badge-porters are. I fully recognise that the Company, in its arrangements respecting passenger's luggage, ought to have regard to the fact that it is taken from their barrows in a very rough and ready way, by porters whose lives have been spent in rude physical labour, and whose methods are such as might be expected from their occupation. It was not, however, according to the finding of the jury as I understand it, to the removal of the luggage from the barrow in the ordinary way that the accident is to be attributed; and the want of supervision would only be material if it were relied on as a distinct cause of action.

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GIBSON, J. :—

The action in this case is for negligence of the defendants' servant in the wheeling and managing of a truck with trunks. It raises no question as to the general luggage arrangements of the station, or as to the sufficiency of the staff. The pleading seems to relate to negligence in moving the truck rather than to leaving it in a dangerous position. The jury have negatived that the truck was set in motion against the plaintiff by the defendants' servant, and the only question, if it is open on the pleading and course of the trial, is whether it was negligently placed in a dangerous position, and whether such negligence was the direct and proximate cause of the plaintiff's injury.

If the truck was placed in a position where under the existing luggage arrangements of the station it would be dangerous, the defendants might be liable if the truck was set in motion either accidentally or by that occasional negligence which, as Lord Halsbury has remarked, is one of the ordinary incidents of human life, and which under the circumstances they ought to have anticipated. They would not, however, be answerable, in an action framed like the present, if the truck was deliberately or wilfully set in motion by an outsider. Would they be responsible if the occasion of the injury was not negligence properly so-called, but acts of affirmative misconduct? This is a question of some difficulty, as in such case the doctrine of remoteness may apply, and the Court ought to be careful not, without strong reason, to make a Company insurer against external misconduct. One trunk was safely removed, and the accident was apparently occasioned by a fight between the badge-porters, availing themselves of the chance absence of the policeman who usually is there to keep order.

The questions left to the jury have been the subject of much discussion. It might have been better to have ascertained by separate questions whether the motion of the trunk was owing to the action of the badge-porters, and, if so, whether that was the result of mere accident, or negligence, or an unlawful struggle and battle for the luggage. I think it was the opinion of the learned Judge that the truck, if left stationary, as described by

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Mooney, was in a reasonably safe position but for the misconduct of the porters.

The case is nearly on the border-line. The substance of the plaintiff's case was that Mooney wheeled the truck over the steps. This was disproved. The case that the truck was left by him in an insecure position in dangerous proximity to the steps was not put forward in any tangible way in the pleading, and there is no clear evidence to support it. The question is, Who was to blame? Upon the verdict, the accident was directly attributable to the misconduct of the porters, and there is no sufficient evidence of negligence on the part of the defendants which could be safely regarded as the proximate cause. It is not enough to establish liabilility that the accident would not have occurred if the truck had been left elsewhere. *Causa sine qua non* is not the same as *causa causans*. Whether the plaintiff could have made out a cause of action founded on the insufficiency of the staff, or negligent arrangements for the distribution of luggage, is not before us. Possibly he could not. On the action as framed, and the evidence, the Court cannot safely disturb the verdict.

A. E. R. J.

Appeal. 1897. March 11, 12.

The plaintiff appealed to the Court of Appeal (LORD ASHBOURNE, C., FITZ GIBBON, BARRY, and WALKER, L.JJ.) who affirmed the decision of the Divisional Court.

Solicitor for the plaintiff: *M. J. Feeny.*

Solicitors for the defendants: *Crawford & Lockhart.*

G. Y. D.

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1896.
Oct. 31.
Nov. 3, 4, 10.

FORREST AND SONS *v.* CARTE (1).

(1896. No. 625.)

Practice—Claim and counterclaim—Judgment, entry of—Action for goods sold and delivered—Defence alleging inferiority in diminution of contract price—Counterclaim for damages for breach of contract in respect of that inferiority—"Event"—Costs—R. S. C., Order XXI., Rule 17.

The plaintiffs sued the defendant for £150 for goods sold and delivered (a boat); the defendant traversed the sale and delivery, and pleaded that the boat was not in accordance with specification, nor reasonably fit for the purposes for which she was ordered, and counterclaimed for damages for breach of contract by reason of such inferiority and unfitness. The jury found that the boat was in accordance with specification, but not "reasonably fit" for the purpose for which the defendant required her, and when delivered was inferior to contract by £30. Judgment was entered thereupon on the claim for the plaintiffs for £120, and on the counterclaim for the defendant, with 1*s.* damages. On motion to review taxation:—

Held, that the plaintiffs were entitled to the general costs of the action, including all costs applicable to any question or matter in controversy on which the plaintiffs succeeded entirely or in part; that the defendant was entitled to all costs exclusively applicable to any question or matter in controversy on his statement of defence; and that neither plaintiffs nor defendant were entitled to any costs in respect of the counterclaim.

MOTION, on behalf of the defendant, to review the taxation of the costs in the action and counterclaim, (*a*) in regard to items in the plaintiffs' bill, which Master Matthews, over-ruling the defendant's objections, had allowed, and (*b*) in regard to items in the defendant's bill which the Master had disallowed.

The action was for goods sold and delivered—£150, balance of the price of a boat built for the defendant. The defendant put in a defence and counterclaim, traversing in his defence the sale and delivery, and pleading that the boat was not in accordance with specification, nor reasonably fit for the purpose for which she was ordered, and counterclaiming for damages for breach of contract in respect of the same matters as pleaded in the defence. The

(1) Before JOHNSON, HOLMES, and MADDEN, JJ.

action was tried in Dublin, on the 6th, 7th, 10th, and 12th June, 1895, before Mr. Justice Andrews and a special jury, to whom the learned Judge left the following questions:—1, Was the Leila constructed in accordance with the specification dated, &c.? (Answer, Yes.) 2, Was she, when delivered to the defendant, reasonably fit for the purpose for which he required her, viz. racing? (Answer, No.) 3, Did the defendant accept her as his own boat? (Answer, Yes). 4, Was she, when delivered, inferior to contract? (Answer, Yes.) 5, If on the evidence you find she was, what sum of money do you assess as fairly representing the extent of such inferiority? (Answer, £30.) The Registrar's certificate set out these findings as above given and stated, "Whereupon the jury found for the plaintiffs, Forrest and Sons, in the original action for the sum of £120, and for the defendant, William Carte, on the counterclaim with 1*s.* damages. The £30 above-mentioned was deducted from £150, the unpaid balance of the contract price of the yacht Leila. The Judge gave judgment for the plaintiffs in the original action for £120 with costs, and also gave judgment for the defendant William Carte, on the counterclaim with 1*s.* damages, and such costs as the judgment entitled him to, which last-mentioned costs when taxed are to be deducted from the plaintiffs' taxed costs of the action."

No judgment was formally entered, but by consent, the plaintiffs furnished their bill of costs, at £376, and the defendant his, at about £203. On these being submitted to the Taxing Master, a conflict arose between the parties as to the issues upon which the evidence of certain witnesses was adduced at the trial, *i.e.* the witnesses called on one side or the other in reference to the capabilities of the boat over and above her general accordance with specification, the plaintiffs contending that the £30 was wholly assignable to the defence, and awarded in diminution of the contract price, and that the defendant was only entitled to such costs as the finding of 1*s.* on the counterclaim would carry, while for the defendant it was argued that as well the £30 as the 1*s.* was recovered by force of the counterclaim, and that no damage or diminution of price could have been awarded to him without the aid of the counterclaim.

Under these circumstances the Taxing Master (in pursuance of

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the resolution of the Judges, dated 18th January, 1893), applied through the Registrar of the Exchequer Division for further information in regard to the trial and the issues submitted to the jury. He pointed out that the plaintiffs charged for some ten witnesses, alleging that their evidence was exclusively applicable to the claim and defence, and the defendant for six, alleging that their evidence was applicable to the counterclaim. He pointed out further that the award of 1*s.* on the counterclaim would in his opinion entitle the defendant, in any event, to an apportionment in respect of the costs, both of plaintiffs and defendant, but that this apportionment would be more favourable to the defendant both in respect of witnesses' expenses and of other charges in case he was entitled to treat the deduction of the £30 as having been recovered by force of his counterclaim only. The learned Judge, in a memorandum in reply, stated:—"In addition to a defence to the entire claim which the defendant made and failed in making, it was competent for him to show how much less than the contract price the yacht was worth, by reason of its being inferior to contract, and this was open to the defendant on his defence without any counterclaim, which would only be necessary in case damages were sought by the defendant outside the reduction of the contract price by reason of the plaintiffs' breach of contract. Inferiority to contract was relied on and proved by the defendant, and, although by the acceptance of the yacht as his own boat, he became liable to the plaintiffs for its value, he was entitled to reduce the plaintiffs' claim for the contract price, by showing, as he did, the inferiority to contract, which the jury measured at £30, and which was deducted from the plaintiffs' claim for £150, judgment being given for the plaintiffs for the balance, viz. £130. No further damages were proved by the defendant, and he therefore was only entitled to nominal damages on his counterclaim, on which, being for breach of contract, he was entited to a verdict, which he got with judgment accordingly for one shilling. The plaintiffs' counsel, when the jury brought in their findings, asked that no judgment should be given on the counterclaim: I ruled against this, and gave the judgment as stated in the registrar's certificate. . . . These rulings and judgment remain undisturbed, and as the costs are to be taxed as if the judgments I gave were entered up, the plaintiffs are

entitled to their general costs of the action, less such costs as the judgment for 1*s.* on the counterclaim entitles the defendant to. What the amount of the defendant's costs should be the Taxing Master will decide, and, as his decision will be open to review, I offer no opinion on what the amount should be, for his decision may become the subject of an application to review and should be his own." The Taxing Master then proceeded with the taxation.

In regard to the plaintiffs' bill, and the defendant's objections to his rulings thereon, the Master reported as follows. (*a*) As to the charge of £52 10*s.* for instructions for briefs, he allowed £45 as a just and reasonable amount, overruling the defendant's objection "that most of the work done and here charged for was for the purpose of proving that the Leila when delivered to the defendant was reasonably fit for the purpose for which he required her, and also that she was not when delivered inferior to the contract, for the purpose of disproving defendant's counterclaim. (*b*) As to refreshers to counsel on the last day of the hearing, the Master disallowed only a small apportionment of the fees charged, thus in substance overruling the defendant's objection that these items should be wholly disallowed, inasmuch as it was urged the Master had held that the defendant was entitled to the costs of one day for the hearing of the counterclaim. (*c*) As to charges for expenses of witnesses, he had allowed the greater part as proper and reasonable, overruling the defendant's objection that these items were incurred for the same purposes as those mentioned in their objection to the charges for instructions for briefs.

In regard to the defendant's bill, the Master disallowed, in effect, all costs subsequent to and including the case for proofs, (save that, in respect of the finding on the counterclaim, he allowed an apportionment of £1 1*s.* on foot of the fees to counsel for the last day of the trial, and £1 1*s.* on foot of the solicitor's fee for attendance), as the case for proofs, &c. in his opinion related altogether to the claim and defence, thus overruling the defendant's objection that these charges were incurred for the purpose of proving that the Leila was, when delivered to the defendant, not reasonably fit for the purpose for which the defendant required her, and that she was when delivered inferior to the contract, and also to sustain the defendant's counterclaim. In reference to the

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disallowance of expenses of witnesses, to which the defendant took specific objection on the same grounds, the Master stated that it seemed to him that under the circumstances they related to the claim and defence only.

In the taxation of both bills the Master stated that he had to the best of his judgment observed the directions contained in Mr. Justice Andrews' memorandum, and in dealing with fees or allowances that were "discretionary" had had regard to the several matters referred to in Order LXV., Rule 64 (37).

Gordon, Q.C. (*W. Boyd* with him), for the defendant.

Ronan, Q.C. (*Herbert Shaw* with him), for the plaintiffs.

The following authorities were cited during the argument:—*Leclerc* v. *Greene* (1); *Myers* v. *Defries* (2); *Stumore* v. *Campbell* (3); *Forster* v. *Farquharson* (4); *Hewitt* v. *Blumer* (5); *The Finska, &c.* v. *Brown & Co.* (6); *Shrapnel* v. *Laing* (7); *Griffiths* v. *Patterson* (8); *Re Brown* (9); *Cole* v. *Forth* (10); *Potter* v. *Chambers* (11); *Smith* v. *Campbell* (12); *Mackey* v. *Bannister* (13); *Davies* v. *Hedges* (14); *Hawke* v. *Brear* (15); *Baines* v. *Bromley* (16); *Ellis* v. *Desilva* (17).

Cur. adv. vult.

Nov. 10. JOHNSON, J.:—

This is a motion, on behalf of the defendant, to allow the defendant's objections to specified items in the costs which the Taxing Master has allowed to the plaintiff, and also in respect of specified items in the costs which the Taxing Master has disallowed to the defendant. The action commenced by writ, specially endorsed, to recover £150 balance (after credit) of the price of a one-rater yacht, built and equipped for, and sold and delivered to, the defendant. The statement of

(1) Ir. R. 4 C. L. 358.
(2) 5 Ex. D. 180.
(3) [1892] 1 Q. B. 314.
(4) [1893] 1 Q. B. 565.
(5) 3 *Times'* Rep. 221.
(6) 7 *Times'* Rep. 578.
(7) 20 Q. B. D. 334.
(8) 22 L. R. Ir. 656.
(9) 23 Ch. D. 377.
(10) 4 Ex. D. 301.
(11) 4 C. P. D. 69.
(12) 29 Ir. L. T. R. 97.
(13) 16 Q. B. D. 174.
(14) L. R. 6 Q. B. 687.
(15) 14 Q. B. D. 841.
(16) 6 Q. B. D. 197, 691.
(17) *Ibid.* 521.

defence, paragraph 1, traversed the sale and delivery; and in the alternative in paragraphs 2, 3, 4, 5, and 6, respectively, alleged distinct breaches by the plaintiff of the contract for the yacht; and in paragraph 7 alleged that, in consequence of these breaches of contract, the defendant refused to and did not accept delivery of the yacht or her gear. The defendant also counterclaimed by reference to the paragraphs of the defence for damages for the respective identical breaches of contract alleged in the statement of defence. Issue was regularly joined on the defence and counterclaim. The action was tried before Mr. Justice Andrews and a special jury, and I take the result from the Registrar's certificate, because, for the present purpose, it does not appear to me material how the judgment is entered; it is the substance and not the form which we must regard. The learned Judge left five questions to the jury:—1st, Was the yacht constructed in conformity with the specification (the defendant, in paragraph 2 of the statement of defence and in the counterclaim, having alleged that she was not so constructed)? The jury answered this question, Yes, in the plaintiff's favour. 2nd, Was the yacht when delivered to the defendant reasonably fit for the purpose for which he required her, viz. racing? The jury answered this question, No, in the defendant's favour? 3rd, Did the defendant accept her as his own boat? Answer, Yes, in plaintiff's favour. 4th, Was she when delivered inferior to contract; and 5th, If so, to what amount? The jury answered these two questions in the defendant's favour, and assessed the amount at £30, which was deducted from the claim of the plaintiff, who, therefore, had a verdict for £120. The plaintiff, therefore, succeeded in the action, and is entitled to the general costs of the action. It sufficiently appears from the memorandum of Mr. Justice Andrews, in reply to the Taxing Master's application for information, that the defendant, although defeated in the action, relied, as he was entitled to do (*Davies* v. *Hedges* (1)) in his defence at the trial, on the breaches of contract in reduction of the plaintiff's claim; and it appears to me, therefore, that having proved no damage in respect of these breaches, except the £30 by which he reduced the plaintiff's claim,

(1) L. R. 6 Q. B. 687.

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the defendant failed on his counterclaim. But though the plaintiff has not objected to the nominal damages on the counterclaim or to the costs taxed to the defendant on the counterclaim; yet, if and to such amount (if any) as the defendant has obtained costs on his counterclaim, he cannot have the same costs in respect of any part of his defence on which he succeeded. Under no circumstances can a person have the same costs twice over. The question then resolves itself into the construction of Order LXV., Rule 1, and its application to the present facts. "Provided that (subject to all existing enactments, limiting, regulating, or affecting the costs payable in any action by reference to the amount recovered therein)"—a proviso not affecting the present question—"the costs of every action question and issue tried by a jury shall follow the event," unless the Judge shall, for special cause, otherwise order. This action was tried by a jury, and the Judge did not otherwise order. In this case the defendant might have admitted the plaintiff's cause of action to such amount as he thought proper, taking on himself the responsibility of an admission to an insufficient amount, or he might have relied on the breaches of contract to reduce the plaintiff's claim; or he might, with greater prudence, have admitted the plaintiff's cause of action and counterclaimed for damages for the breach of contract, in which event the action would have been tried out on the counterclaim alone, and the now defendant then, succeeding as plaintiff in the action by counterclaim, would have been entitled to the whole costs of the counterclaim. The defendant, however, took no one of these courses: he entirely denied the plaintiff's cause of action, and alternatively he relied on the several breaches of contract in his defence, to reduce (as he succeeded in doing) the plaintiff's claim, and notwithstanding this he also counterclaimed for damages for the same breaches. In the result the plaintiff succeeded in the action, while the defendant succeeded in his defence in reducing the plaintiff's demand by £30, in respect of breach by the plaintiff of his contract. In my opinion the terms "action," "question," and "issue," in Order LXV., rule 1, are to be read distributively, and the costs are to follow "the event" (the result) in each instance of such "action," "question," or "issue" as the case may be. I also think that these terms "question" and

"issue" are not to be taken or construed merely as a lawyer would understand them, in respect of pleadings, but mean, and are intended to mean, any definite or distinct matter or point in controversy in the action to which evidence is exclusively applicable: see judgment of Lord Justice Bowen, in *Foster* v. *Farquharson* (1). I also think that the principles laid down in *Leclerc* v. *Greene* (2), to which my brother Holmes has referred (notwithstanding that that case was decided long before the Judicature Act and rules) are of much value, and may, on the retaxation of these costs, prove to be very pertinent to the matters under consideration. On the findings of the jury, under Ord. LXV., rule 1, in my opinion, first, the plaintiff is entitled to the general costs of the action, including the costs of every definite or distinct matter in controversy, in whole or part found for the plaintiff; and 2nd, the defendant is entitled to all the costs of establishing, under his defence, the respective breaches of the contract, which he relied on in reduction of the plaintiff's claim, and found wholly in favour of the defendant, except such costs (if any) as were taxed to the defendant on the counterclaim, and not objected to by the plaintiff.

A further and (so far as I see) substantial question as to these costs arises in respect of the sixth paragraph of the statement of defence, and the answer of the jury to the second question left by the Judge. The sixth paragraph avers a contract for building and equipping a racing yacht in the best manner for the plaintiff and (in terms unnecessarily exaggerated) avers, in breach of that contract, that the yacht delivered was unseaworthy and unsuitable for sailing, which the defendant, having tried her within a reasonable time, discovered, and thereupon refused to accept and did not accept her, and offered to return her to the plaintiff. This, I take it, is the reasonable construction of this defence on which the plaintiff took issue. Two distinct and definite questions or matters of controversy may have arisen on this defence:—first, whether the yacht was fit for a racing yacht, as formulated in the second question left to the jury, and found for the defendant; and secondly, whether she was, or was not, so fit, did the defendant accept her, as formulated in the third question, which was found

(1) [1893] 1 Q. B. 565, 566, *et seq.* (2) Ir. R. 4 C. L. 358.

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for the plaintiff. The effect of the finding on the last question being that the proper expenditure of £30 would bring her up to contract. [His Lordship referred to certain items in plaintiffs' costs, and continued—]. It is plain, therefore, that the fitness of the yacht as a racer was a definite matter in controversy, and was so dealt with by each party in preparing for the trial, and at the trial, where much evidence was adduced by each side in reference to it. The jury, by their answer to the second question, determined this specific "question," or matter of controversy, in favour of the defendant, and, therefore, under Order LXV., rule 1, all costs exclusively applicable to that "question" are to follow the event (the result), viz., its determination in favour of the defendant, and to be taxed to the defendant, even though the plaintiff succeeded in proving that the defendant accepted the yacht. These principles apply to all the defendant's objections, in reference both to the plaintiff's and defendant's costs now under review.

As the matter stands at present, the defendant is entitled to 1*s.* damages on the counterclaim, and to the costs taxed to him on the counterclaim, because not challenged by the plaintiff: though, if they had been challenged, they could not, in my opinion, have been sustained. Excluding the counterclaim, therefore, for this reason from consideration, I think the costs of plaintiff and defendant ought to be referred back to the Taxing Master to tax in accordance with the principles I have stated.

HOLMES, J.:—

The costs to which the parties to this action are respectively entitled are not, in my opinion, affected by either the circumstance that there was a counterclaim, or by the manner in which judgment was entered. No doubt the defendant might have confessed judgment or paid the amount sued for with costs, and delivered a counterclaim for breach of contract. If he had done this, he would have recovered a judgment for £30, carrying with it substantially all the costs of the litigation. But he did not do this. He resisted the whole of the plaintiff's demand, setting forth in his defence the inferiority of the vessel supplied to that contracted for, and repeating the same allegations in a counterclaim. The result was that the price of the yacht was reduced

by the sum of £30, and, save the amount thus allowed him, the defendant was found to be entitled to no damages for the breach of contract. The same result would have followed if there had been no counterclaim, and it is absurd to suggest that a litigant can alter in his own favour the incidence of costs by delivering a wholly useless pleading. The mode of entering the judgment is a matter more of form than of substance. I am disposed to think that the logical course would have been to give judgment for the plaintiff for the reduced amount and against the counterclaim. The question of reduction in the price was determined on the defence, and when no further or other damages were awarded to the defendant, he would seem to have been defeated in the counterclaim. It has been, however, usual, or at least not unusual in such a case as this to give judgment for the full sum sued for, and a cross judgment for the sum by which the price is reduced. The method adopted by Mr. Justice Andrews is, I think, novel, and it is difficult to account for the shilling which is or ought to be included in the £30. But whether one or another of the three courses is adopted, the incidence of the costs is the same. The costs of every action, question, and issue, tried by a jury, are to follow the event, and however the judgment in this action may be shaped, the event is substantially identical. How then, are the plaintiff's costs to be taxed in an action for goods sold and delivered where the jury has reduced the contract price by reason of the goods supplied being inferior to the goods contracted for? If this question had been asked twenty years ago, when I was much more familiar with the taxation of costs than at present, there would, I believe, have been but one answer to it. Every practitioner would have said at once that the reduction of the price would make no substantial difference in the amount to which the plaintiffs' costs would tax. I am now speaking not of cases having peculiar and exceptional features, but of ordinary cases of this class, cases in which after the plaintiff and defendant have tried to prove, the one that the goods are of the quality stipulated for, the other that they are so inferior as to be practically worthless, the jury comes to the conclusion that although the contract has not been fully complied with, the plaintiff is entitled to recover the greater part of the price. As far as I am aware

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there has been no change in the law regulating costs in actions of this kind. The 60th section of the Common Law Procedure Act of 1853 enacted that "the costs of every issue, whether of fact or law, shall follow the finding or judgment upon such issue, and be adjudged to the successful party whatever may be the result of the other issues." The effect of this provision was considered in several cases which are collected in treatises upon the statute. The principle to be deduced from these cases is that where certain issues are found for the plaintiff and certain others for the defendant, with the result of a general verdict for the plaintiff, the latter gets all the costs which are not *exclusively* applicable to the issues on which he has failed, and the defendant is only entitled to the costs *exclusively* applicable to the issues on which he has succeeded; nor can there be any apportionment unless the taxing officer can ascertain satisfactorily the costs applicable to the portion of the case on which the defendant has succeeded.

Since the Judicature Act, apportionment is necessary where a defendant succeeds on a true counterclaim, but in all other respects the law, I believe, remains unaltered. The technical issues of the Common Law Procedure Act have disappeared; and in carrying out the present rule that the costs of every action, question, and issue, shall follow the event, it is necessary to ascertain what have been the substantial matters in controversy between the parties; but this can generally be done without difficulty, and, in doubtful cases, the taxing officer is now authorised to apply to the Judge who tried the action. Applying the foregoing principle to an action like the present, it is clear that the question of inferiority to the contract, if taken by itself, has been found in favour of the defendant, and it is at most highly probably that most of the costs incurred by both parties were in some degree applicable to this issue. It may then be asked how is this consistent with the proposition that in general the reduction of price makes no substantial difference in the taxation of the plaintiff's costs. The answer, I think, is that the issue of inferiority ought not to be taken by itself. It forms only a branch of the wider question of value, upon which the verdict depends; and this is a matter in which neither party succeeds entirely. In the action before us, the plaintiff has

succeeded to the extent of £120, and the defendant to the extent of £30. It rarely happens that the costs applicable to inferiority can be distinguished from the costs applicable to value, or that it is possible to apportion such costs between the two issues. These costs therefore go in most cases to the plaintiff who is entitled to the general costs of the action; and it seems to me to be essential for the proper administration of justice that it should be so. There are instances constantly recurring of persons who, when applied to for the price of goods, which they have received retained and used, decline to pay on the ground of inferiority to contract. Such persons do not confess judgment, and rely upon their counterclaim. They do not pay the value into Court, they plead a false defence to the entire cause of action, when in truth and reality the only question is to what sum is the plaintiff entitled. The result may be to reduce the price by one-fifth; but if a plaintiff who recovers four-fifths of the amount sued for is obliged to pay all the costs applicable in any way to the issue of inferiority, which would often mean the whole costs of suit, he might be pardoned for regarding the litigation as a travesty of justice.

I have so far dealt with general propositions; but I have already said that there is occasionally a case exceptional in its character. I am far from suggesting that this is such a case; but the materials before me do not enable me to decide that it is not.

The principle upon which the taxing officer proceeded, in so far as I understand it, seems to me to have been erroneous; and I do not know what the result would have been if the correct principle had been applied. He found the defendant entitled to a certain amount of costs; but these costs were not ascertained by reason of their having been applicable to any particular issue, but solely because the defendant had recovered a shilling on the counterclaim. Now, for the reasons already stated, I think that none of the defendant's costs were applicable to the counterclaim, and, certainly, none were applicable to this shilling. I could understand the defendant receiving costs applicable to the reduction in price; but the taxing officer does not seem to have considered that question at all. The plaintiffs have taken no objection to the costs taxed for the defendant; and if I were satisfied

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that the plaintiffs' own costs, although in some degree referable to the matters found against them, were all reasonably ancillary to the recovery of £120, I should not send the bill back for further consideration. But I am not satisfied. I find the Judge asked the jury whether the yacht was reasonably fit for racing. No such issue is specifically raised in the pleadings, and I do not know how it was developed, or its comparative importance at the trial. But it appears from the bill of costs that the plaintiffs anticipated it; and, indeed, one of the challenged items on which the sum of £45 was allowed indicates unusual elaboration and minuteness of preparation on this subject. It is possible that this was a substantial question in controversy leading to a definite "event," and completely severable from the other subjects of dispute. It is also possible that it was merely a sub-branch of the inferiority relied on, and that the costs incurred in regard to it would have been necessarily or reasonably incurred in any case. It is not to be assumed that in sending back the bill to the taxing officer, the Court is inclined to take the first mentioned view. Indeed, speaking for myself, I think the other the more probable. But it is for the proper officer, after full inquiry, to form an independent judgment. The declaration that will form part of our order is, that the costs ought to be taxed upon the basis—1, That the plaintiff is entitled to the general costs of the action, including all costs not *exclusively* applicable to a question in controversy upon which he failed; 2, That the defendant is not entitled to any costs of his counterclaim, but is entitled to the costs exclusively applicable to any question in controversy upon which he succeeded.

MADDEN, J., concurred.

The order of the Court was as follows:—

"ON hearing, &c., the plaintiffs, by leave of the Court, having objected to any costs being taxed to the defendant Carte on his counterclaim, the Court doth declare—1, that the plaintiffs, Forrest & Son, Ltd., are entitled to the general costs of the action, including all costs applicable to any question or matter in controversy on which the plaintiffs succeeded entirely or in part; 2, that the defendant Carte is entitled to all costs exclusively applicable to any question

or matter in controversy on his statement of defence on which the defendant succeeded entirely; 3, that neither plaintiffs nor defendant are entitled to any costs in respect of the counterclaim. It is thereupon ordered by the Court that the several bills of costs be and the same are hereby referred back to the Taxing Master for his reconsideration, and the taxation thereof, in accordance with the above declaration, and that the costs of this motion be reserved until further order, with liberty to either party to apply if so advised" (1).

Solicitors for the defendant: *Casey & Clay.*
Solicitors for plaintiffs: *Hayes & Son.*

A. E. R. J.

CURTIS & SONS *v.* ARMSTRONG & CO. (2).

(1895. No. 9368.)

Practice—Claim and counterclaim—Judgment, entry of—Action for goods sold and delivered—Defence alleging inferiority in diminution of contract price—Counterclaim for damages for breach of contract in respect of that inferiority—"Event"—Costs—R. S. C., Ir., Order XXI., Rule 17.

The plaintiffs sued the defendants for £840, balance due for goods sold and delivered—an engine, accumulators, and electric lamps and fittings for the defendants' hotel—and work done and materials supplied under a contract. The defendants delivered a defence—pleading inferiority to contract, in diminution of the contract price, of the engine and of the accumulators, and lodging £670 15*s.* in Court in satisfaction—and a counterclaim for damages for the inferiority of the engine and of the accumulators, and for damages for delay. The contract price of the accumulators was £283.

The jury found that the accumulators were not of the capacity contracted for, with £200 damages; and, as a separate finding, that the value of the accumulators as supplied was £83. They found that the value of the work done was £567 7*s.*, being £103 8*s.* less than the amount lodged in Court. This sum of £567 7*s.* was made up by deducting the £200, as well as the amount of certain disallowed items, from the balance sued for. The other

(1) The plaintiffs' costs were subsequently certified at £300 10*s.* 1*d.*, and the defendant's at £13 1*s.* 4*d.*

(2) Before O'BRIEN, JOHNSON, and MADDEN, JJ.

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findings were in the plaintiffs' favour. A verdict was thereupon directed, and judgment entered for the defendants on the claim with costs, and for the defendants with sixpence damages on paragraph 3 of the counterclaim (for breach of contract in respect of the inferiority of the accumulators), with costs, and for the plaintiffs on the rest of the counterclaim, with costs.

On motion by the plaintiffs that judgment should be entered for them in the original action for £767, with costs, and for the defendants on paragraph 3 of the counterclaim for £200 damages, with costs, and for the plaintiffs on the rest of the counterclaim, with costs, or that the judgment for the defendants on paragraph 3 of the counterclaim should be set aside and judgment entered for the plaintiffs on the entire counterclaim:—

The Court ordered that the judgment for the defendants in the original action, with costs, should stand; that the judgment for the defendants, with sixpence damages, on paragraph 3 of the counterclaim should be varied and stand as a judgment for the defendants thereon without damages and without costs, on the special ground that the £200 damages were at the instance and on behalf of the defendants applied in reduction of the plaintiffs' claim in the original action, and that the counterclaim as to such damages was therefore unnecessary; and ordered that the judgment for the plaintiffs on the rest of the counterclaim be discharged, and that the plaintiffs do have their costs of the issues found in their favour in the original action.

NEW TRIAL MOTION.

This action, the trial of which occupied four days before the Lord Chief Baron and a special jury, was brought by the plaintiffs to recover £840 18*s.* 3*d.*, for work and labour done and materials provided, and for goods sold and delivered, and hire of goods, and money paid, and for interest. Lengthy particulars were subjoined to the claim, from which it appeared that this amount was made up of the balance (after allowing certain credits) of the contract price (£1228) contained in an estimate dated 7th February, 1895, for fitting up with electric light, including engines, dynamos, and accumulators, the Royal Hotel, Kingstown, and £493 7*s.* 2*d.* for extras. The credits included items of £279, *i. e.* £315, less discount and carriage, for an engine which had been returned, and £16 2*s.* 6*d.* for returned table lamps. The estimate price of the accumulators was £283.

The defendants filed a defence traversing (paragraphs 1 to 6) the causes of action, pleading (paragraph 7) that it was a condition of the contract that the work should be done to the satisfaction of the defendants' engineer, and that same was not so done;

and (paragraph 8) that the engine supplied under the contract was defective and insufficient, and not in accordance with the contract, and did not satisfy the engineer of the defendants, and that the estimate price of this engine was £375, and not the amount for which credit was given by the plaintiffs. As a further defence (paragraph 9) the defendants brought £670 into Court. The defendants counterclaimed (paragraph 1) that under the contract the plaintiffs had agreed to supply an oil-engine of the Hornsby Acroyd type of 25-brake horse-power with fittings for £375, and a dynamo of a certain power for £120, with fittings for £70, and £14 for labour, the workmanship to be of first-class character, and materials of the best of their respective kinds, to the satisfaction of the defendants' engineer, but that neither the engine nor the dynamo, nor the workmanship, nor the materials provided, were of the description contracted for, nor were same provided to the satisfaction of the defendants' engineer, but that on the contrary the engine was wholly defective, in consequence of which the engineer of the defendants had to require the same to be removed; (paragraph 2) that the said dynamo was not of the power contracted for; (paragraph 3) that under the contract the plaintiffs had agreed to supply certain accumulators of a certain type and power, of first-class character, the materials to be the best of their respective kinds, and the work to be done and the materials to be supplied to the satisfaction of the defendants' engineer, but that the articles supplied and the workmanship and materials were not of the description contracted for, nor did they satisfy the defendants' engineer, and that the accumulators were defective and worthless; (paragraph 4) that, on the suggestion and representations of the plaintiffs, it was agreed subsequently to the contract to substitute other accumulators for those originally contracted for—the plaintiffs alleging these accumulators so substituted to be of greater power than the others, and to have been in use for not more than six months—it being a condition that these should be in good order and condition and of a certain capacity, and should be to the satisfaction of the defendants' engineer, but that they were old and worthless, and did not satisfy the engineer; (paragraphs 5 and 6) that it was a term of the contract that the works should be completed on or before the 1st June, 1895, and that they were

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not so completed; and that the plaintiffs should maintain the works for twelve months after completion, which the plaintiffs did not do; (paragraph 7) that it was a term of the contract that the works should be completed on the date mentioned, and that, time being an essential element of the contract, any delay should subject the plaintiffs to a deduction from the contract price of £5 per diem for every day that the contract time was exceeded—this provision applying only to the works inside the hotel—and that the works were not complete on the day mentioned, and were still incomplete. The defendants counterclaimed £1000 in respect of the matters in paragraphs 1 to 6 of their counterclaim, and £1010 in respect of the penalties mentioned in paragraph 7.

The plaintiffs in their reply joined issue, and traversed the averments in the defence and counterclaim, alleging further, as to the oil-engine (paragraphs 3 and 5) that subsequently to the contract the defendants suggested the substitution of a "Clarke and Chapman" engine of the "Butler" type and of 25 horse-power, and that at the defendants' request the plaintiffs supplied such engine, and afterwards at the request and cost of the defendants removed the same; that, as to the accumulators (paragraph 11), the plaintiffs had merely informed the defendants that the substituted accumulators were for sale, and that they had heard that they were of greater power than those mentioned in the contract, and that they had been used in the Townhall, Portsmouth, and thereupon it was agreed that Mr. Berry, an engineer in the plaintiffs' employment, should go to Portsmouth and purchase them if satisfied that they were suitable and in order; that the defendants agreed to take them in satisfaction for the accumulators mentioned in the contract if the said engineer was so satisfied, that the said engineer was satisfied and purchased the accumulators, and that the defendants thereupon accepted the same; that (paragraph 16), as a defence to paragraph 6 of the counterclaim, the maintenance clause did not extend to renewals of lamps or making good anything that had gone wrong owing to unfair usage, and that otherwise the plaintiffs had maintained the works since completion as contracted for; that (paragraphs 15 and 16) the delay, if any, had occurred by reason of extra works done at the defendants' request and by reason of the defendants' prevent-

ing the plaintiffs' workmen from having access to rooms in the hotel.

The defendants joined issue.

The following were the questions submitted to the jury, with their answers thereto :—

1 (*a*) Was the Clarke and Chapman engine of 25 actual horse-power? [*Yes.*] (*b*) Was it defective, otherwise than in type or design? [*No.*] (*c*) Was the workmanship in connexion with it of first class character? [*Yes.*]

If you answer—(*a*) or (*c*) in the negative, or (*b*) in the affirmative, assess the defendants' damages in respect of this breach of contract.

2. Were the accumulators supplied of the capacity contracted for and in good order and condition? [*No.*] If not, assess the defendants' damages in respect of this breach of contract. [£200.]

3. Have plaintiffs maintained the work contracted for since the 1st June, 1895, excluding removal of lamps and making good anything which went wrong owing to unfair usage? [*Yes.*] If not, assess the defendants' damages in respect of this breach of contract.

4. Were the works contracted for (exclusive of the Arc lamps and outside works) completed on the 1st June 1895? [*No.*]

5. If not, was the completion thereof on said 1st June, prevented by the defendants, either (*a*) by their orders for the extra works? [*No.*]—or (*b*) by their preventing the plaintiffs' men from having access to rooms in the hotel? [*No.*]—or (*c*) by the defendants' selection of the Butler type of engine? [*Yes.*]

If you answer 4 and 5 in the negative assess the defendants' damages caused by delays (over and above such part of the damages, if any, you may have allowed in answers to questions 1 and 2 as you have assessed by reason of delay). [*No damages.*]

6. Were the works completed to the satisfaction of Mr. Berry (1) on the 1st June, 1895, or at all, save so far as completion was prevented by any of the matters in No. 5? [*No.*]

7. What sum, if any, do you allow to the plaintiffs in respect

(1) The defendants' engineer.

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to the following items [of extras charged at, in all, £246 8s.]? [*The jury allowed* £202 8s.] [This included, an item of August 8th, "fixing steam engine in position to Mr. Berry's instructions, £165," in respect of which the jury allowed £140.]

8. Do you allow the plaintiffs interest on the sums due under the written contract, and if so, at what rate? [*No.*] (The rate you allow cannot exceed the current rate.)

9. Are the defendants entitled to credit £67 10s. in respect of the returned engine, or to £5 2s. 6d. in respect of the return of table lamps over and above £279 7s. 6d. and the £16 2s. 6d. respectively allowed therefor? [*Allow* £17 10s.].

10. What was the value of the accumulators as supplied? [£83.]

And the jury found that the value of the work done was £567 7s., being £103 8s. less than the sum lodged in Court.

Upon these findings the jury, by direction of the Judge, found for the defendants on the causes of action contained in the claim, and further found for the defendants with sixpence damages on the 3rd paragraph of the counterclaim, and also found for the plaintiffs on the 1st, 2nd, 4th, 5th, 6th, and 7th paragraphs of the counterclaim.

The Judge thereupon gave judgment for the defendants on the claim with costs and for the said defendants with sixpence damages on the 3rd paragraph of the counterclaim with costs, and for the plaintiffs on the residue of the counterclaim with costs.

Counsel on behalf of the plaintiffs now moved for an order that the verdict and judgment entered might be set aside, on the ground that, having regard to the pleadings in the action, the course of the trial, the evidence of the witnesses, and the findings of the jury, judgment should have been entered for the plaintiffs in the original action for £767 7s. with costs, and for the defendants on the 3rd paragraph of their counterclaim for £200 damages with costs, and on the other paragraphs of the counterclaim for the plaintiffs with costs, and that the judgment should be entered accordingly; or, in the alternative, that the judgment entered up for the defendants on the 3rd paragraph of their counterclaim might be set aside, and judgment entered for the

plaintiffs on the entire counterclaim with costs, and for the costs of this application.

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J. H. Campbell, Q.C. (*Matheson*, Q.C., and *Molony*, with him), for the plaintiffs.

Serjeant Dodd and *H. Wilson* (with them *Gordon*, Q.C.), for the defendants.

Cur. adv. vult.

O'BRIEN, J.:— Feb. 23.

On account of the importance to the parties of the result in the particular instance, and still more of the necessity of laying down, amidst somewhat contradictory decisions, a rule that may affect matters of constantly recurring practice, it is necessary to go at some length into the nature of this motion, the main object of which is to restore or to attribute to a counterclaim a sum found by the jury, with the effect of leaving the amount paid into Court insufficient to satisfy the plaintiffs' claim, and thus determine the costs of an unusually expensive action, or in the alternative to decide the question of the costs of the counterclaim, also assumed to be of serious amount. The action was brought by a contractor for electric lighting, to recover a large sum of money, the statement of claim, in the part which alone would ordinarily be called pleading, alleging it to be due for work done and materials provided, and money paid at request. To this statement were subjoined "particulars," containing, first, the item of £1228, "as per estimate" of a certain date, and bringing it down by deductions to the sum of £1055 15*s.*, with the description, "amount due under contract," and, after adding interest, claiming, under the head of work done and materials provided, and goods sold, and money paid (which, no doubt, was meant to comprehend all extra work, or what was unprovided for in the contract of the date mentioned), a further sum of £478, of which further particulars were given in schedules of several pages length.

As an argument for not admitting the sum found by the jury on the counterclaim to be carried to the account of the causes of action in respect of which money was paid into Court, counsel contended, in an argument that certainly did some violence to

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received notions, that this was an action upon a special contract, in which, either under the traverse or the payment into Court, a claim, by way of reduction of damages, could have no place; conceding, however, at the same time, that this would not be the case under the former law, but was the effect of the Judicature Act, to which novel consequences are sometimes erroneously attributed. We were all immediately of opinion that this argument would not bear examination. The particulars, which are always open to be amended, and which are inserted to obviate the necessity of a statement of claim, or in anticipation of a motion for that purpose, or to fulfil the conditions of a specially indorsed writ, on which an order for judgment may be obtained, have not that effect at all. Moreover, these particulars are divided into two classes—the sums due under the contract, and sums expressly declared as for work done, to both of which the general counts could not be applied if the action were on a special contract; and this distinctly shows they were merely particulars, intended both to be comprehended under the general claim contained in the writ, which is applicable alike where the contract is fully executed, and is in that case then the measure of the price, and where work is done and accepted under the contract, though not in compliance with its terms. In this case the action was necessarily framed in the general form, for the plaintiffs could not have recovered at all under the special contract, which was still open and unperformed, because it was certain that the engineer's certificate had never been obtained. Even if it had been brought in a special form, with a traverse of the work being equal to the contract, it would have been open to give evidence of that in reduction of damages, whether or not in such a case it would have been open to do so upon the defence of payment into Court without any other plea. Therefore this part of the argument is expressly out of the case, and therefore evidence of the work not being according to contract was distinctly applicable under the traverse of the causes of an action and the payment into Court in order to reduce the plaintiffs' claim.

Besides the defences denying the causes of action, and the payment into Court, there was a counterclaim, which was divided into two branches, one claiming damages for the inferiority of

the work, and the other for injuries consequent on the breach of contract. The former, though capable of being used in reduction of the demand in the action, were still properly the subject of a counterclaim, while the latter, under the decision in *Mondel* v. *Steele* (1), certainly could not be recovered otherwise than through the counterclaim. The jury having found £200 damages for the breach of contract as to the accumulators, part of the machinery, and having stated that the value of these articles as supplied was £83, instead of £283, the price charged, which of course showed that the £200 damages was given for the balance of the money, the Judge applied the £200 to reduce the plaintiffs' claim, and this brought down the entire amount recovered to less than the sum lodged in Court, thus rendering the plaintiffs liable to the costs of the action.

This course was objected to on two grounds: first, that it was not legal to reduce the sum found for the plaintiffs, including the amount paid into Court, by carrying over to the credit of the action what was claimed in the counterclaim; and, secondly, because it was a surprise upon the plaintiffs, who could have given other evidence concerning the value of the accumulators, if that were the principal question, and not the consequences resulting from the alleged breach of contract, and the penalties for delay, for which together not less than £2000 was claimed by the defendants.

As to the first point, it was contended that the £670 lodged in Court was a fixed sum, which, on the defence filed, could have been taken out of Court—as it would appear the plaintiffs could have done under the new rules. They could thus have removed it from all risk of reduction and entitled themselves to the costs; while, if the defendants recovered under all their heads of claim for consequential damage, so long at least as the amount was less than that lodged in Court, the plaintiffs still would have an absolute right to the money paid into Court and to the costs.

With respect to the second ground, it was urged that by the sudden transposition of the £200 the plaintiffs' counsel were deprived of the opportunity of directing the attention of the jury

(1) 8 M. & W. 858.

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to the value of the articles for the defect in which that sum was awarded. And what was relied upon as strong proof that the value of those articles was not fully before the jury, was the list of specific items concerning which the Judge put certain questions to the jury, which did not include the accumulators.

But there is an answer to each point. I was under the impression, during Mr. Campbell's argument—which made a strong case both of technical difficulty and grave risk of surprise—that the jury found the £200 as damages expressly on the counterclaim. That is not exactly so. The question put to them by the Chief Baron was, Were the accumulators supplied of the capacity contracted for and in good order and condition? To which they answered "No." "If not," was the further question, "assess the defendants' damages in respect of this breach of contract." To which they answered:—"The jury assess £200 damages." Afterwards he added the question:—"What was the value of the accumulators as supplied?" To which the jury answered:—"£83." So that what the jury strictly did was, they took £200 off the price, leaving that sum to be put to the credit of the defendants wherever by law it could have a place.

All the questions that arose upon the case were put together, without distinction whether they were referable to the counterclaim or to the action; and the sums that were assessed remained to be put at their proper places. Counterclaim is properly a cross-claim, and deficiency in value is properly a deduction in the price. And certainly it would be a startling thing if a person, sued for the value of work and materials, and paying money into Court to save himself from costs, were still to be made liable for costs, though the value was found to be less. The test is: Would the defendant be entitled to show the amount was sufficient, even though there was no counterclaim? He clearly would. There is a plain difference, where the deduction is on the demand itself, and where it follows from cross-claims, which the plaintiff might not know the defendant would set up at all,—though it is one of the anomalies attending the existing system that cross-claims, though they have no effect on the action within the amount of the plaintiff's claim, yet, if they exceed the claim altogether, are allowed to determine the costs, as in the case of *The Finska, &c.*

v. *Brown & Co.* (1). This must be on the ground that the "event" in that case remains with the defendant. In my opinion, therefore, the course that was pursued by the Chief Baron in applying the £200 to reduce the sum recovered by the plaintiff bringing it thus below the amount paid into Court, and so deciding the costs of the action, though the situation was new, was at once bold and right, and was that demanded by necessary justice.

Another question of less importance in the result, but, technically, not less embarrassing, remains. The plaintiffs say the defendants had no right to have the judgment entered for them on the counterclaim with nominal damages, which would carry the costs of the counterclaim, because the £200 was put to the account of the action and they were defeated as to the rest of the counterclaim, and, therefore, there was nothing to sustain the judgment. This is nearly, but not altogether, identical with a late case in this Court (2) where in an action for the price of a yacht, the jury of themselves took off from the plaintiff's demand a sum for breach of contract that was insisted on in the counterclaim, and the Judge, nevertheless, gave judgment on the counterclaim. This was set aside by the Court on the ground that on the issues as found there was nothing on which a judgment could stand. Mr. Matheson, however, contended in the present case that not only were the defendants not entitled to judgment, but that the plaintiffs were. The question, in such cases, is, who succeeds? Both parties claim the victory. The plaintiffs say that all the defendants gained was drawn out of the counterclaim to meet the needs of the action, and that they failed as to the rest—that, therefore, what they used to escape the costs of the action, they could not retain to give them the costs of the counterclaim. But I think the victory is not less the defendants' because they drew off their forces to another part of the field. Before the appropriation and notwithstanding the appropriation of the £200, they succeeded as to what was properly part of the counterclaim.

In the conflict of decisions and for the solution of the embarrassing questions that arise as to the division of costs, we must recur

(1) 7 *Times'* Rep. 578. (2) *Forrest* v. *Carte, ante*, p. 314.

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to the positive rule of the statute which makes a counterclaim an action, and declares that the costs of all issues shall abide the event, unless the Court shall otherwise order on special grounds. Some one must have a judgment on the counterclaim, for it cannot be left without a judgment altogether, and it cannot be contended the plaintiffs are entitled to have it entered for them. Under such a judgment the defendants would be entitled in law to tax the costs. But, inasmuch as, by the application of the amount recovered by them to the action, of which they have got the benefit, they have shown that the counterclaim was not necessary for the purpose in which alone it succeeded,—the defendants ought not to have the costs of the counterclaim on that special ground; while the plaintiffs are entitled by the ordinary rule to the costs of all the issues, whether on the action or on the counterclaim, on which they succeeded. Upon this view of the case the result would be that the verdict and judgment in all respects would stand, but that the defendants should have no costs of the counterclaim, on the ground stated (to be mentioned in the order), and that the plaintiffs should have the costs of the issues on which they succeeded.

JOHNSON, J.:—

I entirely concur in the judgment that has been just delivered, and the reasons expressed by my brother O'Brien.

MADDEN, J.:—

And I, too, entirely concur in the result, and in every portion of the judgment that has been read.

O'BRIEN, J.:—

We consider that the defendants have substantially succeeded, and are entitled to the costs of this motion.

The order of the Court was as follows:—

"IT is ordered that the judgment for the defendants in the original action, with costs, do stand, and that such costs do include defendants' costs of proving the damages recovered by the defendants on the 3rd paragraph of the counterclaim to be taxed and ascertained as if said damages had been proved in the original action in

reduction of the plaintiffs' claim. It is further ordered that the judgment for the defendants, with sixpence damages and costs on the 3rd paragraph of said counterclaim, be varied as to said damages and costs, and do stand as a judgment for the defendants on said 3rd paragraph of said counterclaim, without damages, and also without costs, for the special cause hereinafter shown and mentioned, viz. that the damages, found for the defendants on said 3rd paragraph of said counterclaim in answer to question 2, set out in the certificate of the Lord Chief Baron's deputy registrar, dated the 22nd December, 1896, were, at the instance and on behalf of the defendants, applied in reduction of the plaintiffs' claim in the original action, as if proved by the defendants in the original action, whereby the amount of plaintiffs' said claim was reduced below the sum lodged in Court by the defendants under paragraph 9 of their statement of defence, and the defendants thereby have obtained judgment with costs in the original action as aforesaid, and therefore the counterclaim as to said damages was unnecessary. It is further ordered that the judgment for the plaintiffs on paragraphs 1, 2, 4, 5, 6, and 7 of the counterclaim be discharged, and that the plaintiffs do have the costs of the issues found in their favour in the original action or action by counterclaim respectively. It is also further ordered that the plaintiffs do pay to the defendants the costs of this new trial motion and the argument thereon when taxed and ascertained.

Solicitors for the plaintiffs: *Thomas Gerrard & Co.*
Solicitors for the defendants: *Norman & Law.*

A. E. R. J.

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THE GREAT NORTHERN RAILWAY CO., Appellants; THE LURGAN TOWN COMMISSIONERS, Respondents (1).

Public Health (Ireland) Act, 1878 (41 & 42 *Vict. c.* 52), *s.* 107—"*Nuisance*"—"*Accumulation or deposit*"—*Railway Company—Manure carried by Railway Company to and from, and loaded and unloaded at, a station within the limits of a rural sanitary authority.*

The Great Northern Railway Company carried for delivery to customers, and loaded and unloaded manure at their station at Lurgan. The urban sanitary authority of Lurgan (in the centre of which town the station was built) obtained an order of Justices under the Public Health (Ireland) Act, 1878, prohibiting the Company from loading or unloading manure on any part of their station or line within the district that was less than one hundred yards from any dwellinghouse. On Case Stated:—

Held, that this did not constitute a nuisance within the Act, and that the order of the Justices was therefore wrong.

Case Stated by the Justices of the county Armagh, pursuant to the provisions of 20 & 21 Vict. c. 43, for the opinion of the Queen's Bench Division in the matter of a complaint heard before them on the 4th August, 1896, at Lurgan Petty Sessions, in which Frederick W. Pollock, executive sanitary officer of the Lurgan Sanitary Authority (the Lurgan Town Commissioners) was complainant, and the Great Northern Railway Co. of Ireland were the defendants. The summons was in the following terms:—

PETTY SESSIONS (IRELAND) ACT, 1851 (14 & 15 VICT. c. 93).
PUBLIC HEALTH (IRELAND) ACT, 1878 (41 & 42 VICT. c. 52).

County of Armagh, to wit.

To The Great Northern Railway Company (Ireland), Owners of certain Railway Premises situate at or alongside of Brownlow-terrace, in the town of Lurgan in the Lurgan Sanitary District.

You are required to appear before the Justices forming the Court of Petty Sessions, to be holden at Lurgan . . . to answer the complaint this day made

(1) Before Sir Peter O'Brien, L.C.J., and O'Brien, Johnson, and Holmes, JJ.

to me by Frederick W. Pollock, Executive Sanitary Officer, Lurgan, that on the premises above-mentioned, in the parish of Shankhill, in the district under the Public Health (Ireland) Act, 1878, of the Lurgan Urban Sanitary authority (the Town Commissioners of Lurgan) there existed recently, to wit, on or about the 28th May, 1896, a nuisance arising from the presence of a number of waggons, the property of the said Great Northern Railway Company (Ireland), laden with manure or other filthy matter, and that the said nuisance is caused by the act or default of the owner of said premises, you the said Great Northern Railway Company (Ireland), and that although the nuisance so complained of has on sundry occasions since the 28th May, 1896, been discontinued, it has recurred at intervals since that date, and there is reasonable ground to consider that the same or the like nuisance is likely to recur on the said premises.

Dated, &c.

This summons, after some adjournments, finally came on for hearing and was disposed of on the 4th August, when the Justices, as set out in the Case, "on proof on oath that at or recently before the time of making the said complaint, to wit, on the 28th day of May, 1896, the cause of nuisance complained of did exist on the said premises, but that the same hath since been removed; yet, notwithstanding such removal, we being satisfied that it is likely that the same or the like nuisance will recur on the said premises, do hereby prohibit the said Great Northern Railway Co. (Ireland), from placing, storing, loading or unloading any similar or like manure or filthy matter on any part of their station or line within the said Lurgan Sanitary District that is less than one hundred yards from any dwellinghouse or school or from any premises in which any person may be employed in any trade or manufacture."

On the application of the defendant Company, the present Case was stated, setting out the summons and order made thereon, as above mentioned, and the following notice, which was served on the defendant Company on the 29th May, 1896:—

To THE GREAT NORTHERN RAILWAY COMPANY (IRELAND), having an office at Lurgan.

TAKE NOTICE that, under the provisions of the Public Health (Ireland) Act, 1878, the Lurgan Urban Sanitary Authority, being satisfied of the existence of a nuisance at the premises of the Great Northern Railway Company adjoining the goods station at Lurgan, and opposite Brownlow-terrace, arising from the presence thereon of a number of waggons of manure and filth, which

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give forth most offensive emanations, especially during the period of unloading, detrimental to the health of the neighbourhood, as well as being a nuisance and injurious to health, do hereby require you within twenty-four hours from the service of this notice to abate the same, and for that purpose to remove said waggons and their contents, and not again to store or unload waggons containing such manure or filth on said premises. If you make default in complying with the requisitions of this notice, or if the said nuisance, though abated, is likely to recur, a summons will be issued, &c.

The case then set out that evidence in support of the complaint was given, to the effect that on the date in question, and on sundry occasions before and after that date, uncovered waggons, laden with manure or filthy matter, emitting very offensive odour, were brought to Lurgan by rail by the defendants, and were allowed to remain on defendants' premises, in proximity to a number of dwellinghouses, a Model National School, and a linen factory, till such time as the farmers to whom the stuff was consigned could take delivery. The recurrence in the past, and the likelihood of the recurrence in the future of the alleged nuisance, was proved to the satisfaction of the Justices. Dr. Agnew, medical officer of health, on cross-examination, proved that the manure could not possibly be brought to Lurgan without creating a nuisance dangerous to health within a distance of 100 yards from any point in the station at which the waggons containing the stuff were placed for unloading. The complainant knew the consignees of the manure, but had taken no steps to prevent them from bringing the manure to Lurgan. It was further proved that, as the railway station at Lurgan is constituted, the best available means were taken to prevent injury to public health arising from the manure in the waggons, and that the delivery of the stuff to the consignees was always expedited as much as possible.

The defendant Company contended before the Justices that as public carriers they were bound to receive the manure or filthy matter at Belfast to carry it to Lurgan, and there deliver it to the persons to whom it was consigned, and that they could not be penalized for doing what they were by statute authorized to do. They argued further that admitting the manure to be matter of a very filthy and offensive nature and a nuisance within the

Public Health (Ireland) Act, the persons by whose default the nuisance arose were the consignees and not the Railway Co. They further argued that the notice to abate was bad as not specifying the mode of abatement, and that, in any event, the defendants had taken the best available means of abating the alleged nuisance.

The Justices, overruling these contentions, held that the evidence rendered the defendants liable under the statute (41 & 42 Vict. c. 52), and gave judgment against the defendants accordingly, submitting now for the opinion of the Court the question whether they "were correct in point of law" in their determination.

James Chambers (*J. H. Campbell, Q.C.*, with him), for the defendant Company:—

This prosecution was brought under section 112 of the Public Health (Ireland) Act of 1878 (1). The defendants contend, first, that being a Railway Company constituted under Act of Parliament, they cannot be held liable under the penal provisions of the Public Health Act in regard to nuisances, in the absence of

(1) The enactments of the statute 41 & 42 Vict. c. 52, material to the present case are these:—

Section 107 provides that, "For the purposes of this Act—1, any premises in such a state as to be a nuisance or injurious to health . . . 4. Any accumulation or deposit which is a nuisance or injurious to health . . . shall be deemed to be nuisances liable to be dealt with summarily in manner provided by this Act: provided, first, that a penalty shall not be imposed on any person in respect of any accumulation or deposit necessary for the effectual carrying on any business or manufacture if it be proved to the satisfaction of the Court that the accumulation or deposit has not been kept longer than is necessary for the purposes of the business or manufacture, and that the best available means have been taken for preventing injury thereby to the public health. . . ."

Section 110 provides:—"On the receipt of any information respecting the existence of a nuisance the Sanitary Authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the same within a time to be specified in the notice, and to execute such works and do such things as may be necessary for that purpose. . . ."

Section 111 provides:—"If the person on whom a notice to abate a nuisance has been served makes default in complying with any of the requisitions thereof within the time specified, or if the nuisance, although abated since the service of the notice, is, in the opinion of the Sanitary Authority, likely

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proof of negligence on their part, where the alleged nuisance—such as in the present instance the carriage of manure—is a matter which under the statutes they are authorized, or rather bound to do. Further, the temporary detention, at a station within a sanitary district, such as the town of Lurgan, of waggons laden with manure, for the time reasonably necessary for loading or unloading them at the Company's station, or for the purpose of shunting, does not constitute a nuisance within the meaning of the Public Health Act. Further, the notice served under section 110 of the Act is bad as not specifying the things or matters to be done. The form of the notice as given in the Act (Schedule C, Form 1) prescribes that the notice is to "state anything required to be done or works to be executed." No such thing as this hundred yards' limit which is here imposed is mentioned or contemplated by the Act; the Act contemplates the removal of something permanent—something that "is kept" so as to be injurious to health. Lastly, in any event the consignees, not the Railway Company, would be liable. The two cases relied on by the complainants in the Court below, *The Mayor, etc. of Scarborough* v. *Rural Sanitary Authority of Scarborough* (1), and *The Letterkenny Town Commissioners* v. *Collins* (2) —a note of which is to be found in Vanston's Law of Public Health in Ireland, at page 150—can at most only assist them on the same minor point.

to recur on the same premises, the Sanitary Authority shall cause a complaint relating to such nuisance to be made before a Justice, and such Justice shall thereupon issue a summons requiring the person to whom the notice was served to appear before a Court of Summary Jurisdiction."

Section 112 provides:—"If the Court is satisfied that the alleged nuisance exists, or that although abated it is likely to recur on the same premises, the Court shall make an order on such person requiring him to comply with all or any of the requisitions of the notice, or otherwise to abate the nuisance within a time specified in the Order, and to do any works necessary for that purpose; or an Order prohibiting the recurrence of the nuisance and directing the execution of any works necessary to prevent the recurrence; or an Order both requiring abatement and prohibiting the recurrence of the nuisance.

"The Court may by their Order impose a penalty not exceeding £5 on the person on whom the Order is made, and shall also give directions as to the payment of all costs incurred up to the time of the hearing or making of the Order for abatement or prohibition of the nuisance."

(1) 1 Ex. D. 344. (2) Unreported.

Dealing with the first point, "manure" is expressly mentioned from the very first in the Acts regulating this Company. "Dung and all sort of manure" are expressly mentioned in 6 Wm. 4, c. xxxiii., sect. 133, in 8 Vict. c. cxiv., sect. 54, and in 55 & 56 Vict. c. lxiv. These statutes show that beyond all question the Railway Company is authorized to carry manure, and is bound to carry manure for their customers, and this authority and duty necessarily involves loading and unloading and conveyance through the stations of the Company. The Railway and Canal Traffic Act of 1854 provides that Railway Companies shall afford all reasonable facilities for receiving, forwarding, and delivering traffic without delay and without partiality; and "traffic" is defined in section 1, in the widest possible way as including not only passengers and their luggage and *goods*, *animals*, *and other things*, conveyed by the Railway Company . . . but also carriages, waggons, trucks," etc. There is no possibility of excluding from this definition the goods and things which are specially mentioned in the Acts just referred to. Since the passing of the Act of 1854, "Railway Companies cannot absolutely refuse to carry traffic which they have facilities for carrying, even if they did not profess to carry, and did not generally carry, such traffic, but would be compellable to carry it, not as common carriers, but with the liabilities of ordinary bailees, and subject to reasonable conditions limiting that liability": *per* Lindley, L.J., in *Dickson* v. *The Gt. Northern Railway Co.* (1). See also *The London, Brighton, and South Coast Railway Co.* v. *Truman* (2); *R.* v. *Pease* (3); and *Hammersmith Railway Co.* v. *Brand* (4). These cases bear out the proposition stated, and are directly in point here where the alleged nuisance is caused by the necessary and proper exercise of a statutory authority conferred upon the Railway Company to carry manure, a refusal to carry which would be actually illegal. [Counsel also referred to *Molloy* v. *Gray* (5).] In the present case there is nothing to which the respondents can point as a wrongful act or default on the part of the Railway

(1) 18 Q. B. D. 176, at p. 189.
(2) 11 App. Cas. 45.
(3) 4 B. & Ad. 30.
(4) L. R. 4 H. L. 171.
(5) 24 L. R. Ir. 258.

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Company, and, therefore, this decision is an authority that what is here alleged cannot be a nuisance within the Public Health Act. The facts, in the present case, negative any suggestion of negligence; and the Justices have found that it was proved that, without causing the alleged nuisance, the Railway Company could not carry these goods to and from, or through, Lurgan. Where the alleged nuisance arises from the proper and reasonable user and working, under statutory authority, of a railway line, as opposed to damage or nuisance caused by its construction, no right even to compensation exists, and, *a fortiori*, no action for an injunction to abate such alleged nuisance could lie: see *Hammersmith* v. *Brand* (1), and *Hare* v. *Metropolitan Ry. Co.* (2). [*Rylands* v. *Fletcher* (3), and *Vaughan* v. *Taff Vale Ry. Co.* (4) were also cited.]

If any mode could be suggested in which the Railway Company could carry on this traffic, reasonably and properly, without creating a nuisance, then, no doubt, such a case as *Rapier* v. *London Tramways Co.* (5) might be an authority; but the station at Lurgan is closed in on all sides by the town, and the complainants' contention would involve the necessity of making a new station outside the town. Further, if the sanitary authority of Lurgan be right, then they might forbid artificial manures, of a still more obnoxious smell, being brought from the neighbouring works at Ballybot through their township, or make an order that no cart, laden with manure, should be unloaded within 100 yards of any dwellinghouse within the sanitary district.

[HOLMES, J.: If there is no fallacy in your argument that the Company are authorised to carry this kind of manure, they are, I think, entitled to carry it from and through this particular station, for the Company were authorised under their statutory powers to build this particular station, and no other, in the neighbourhood; but, whatever doubts there may be in my mind as to this part of your case, you are now coming to the second branch of the argument, which I confess appears to me to be, from Mr. Stanley's point of view, much more formidable. All through the Act "nuisance" appears in conjunction with the alternative "injurious

(1) L. R. 4 H. L. 171.
(2) [1894] 1 Q. B. 384. [330.
(3) L. R. 1 Ex. 265; L. R. 3 H. L.
(4) 5 H. & N. 679.
(5) [1893] 2 Ch. 588.

to health"—"a nuisance or injurious to health"—and would seem to apply to something of a permanent character. Take the instance of a trader rolling barrels into his stores—a case that has given rise to a great deal of litigation in England—can it be suggested that section 107 was intended to apply to such a matter at all? Take any of the sub-sections of section 107. There is an idea of permanence running all through them. Take sub-section 3, "any animal *so kept* as to be a nuisance or injurious to health"; take sub-section 6, "any factory, &c., *not kept* in a cleanly state." I do not say or mean to say that there should not be or might not be legislation upon these matters, or that penalties should only be imposed for nuisances that are in some measure permanent; but we must look to the scope of this Act, which is to enable the Sanitary Authority to keep the district in a sanitary state. JOHNSON, J.: The illustrations in the schedule forms also point to something of a permanent nature.]

That is our second contention, that all through section 107 there runs the idea of some improper state of things maintained or continued. Sub-section 1, for instance, is, "any premises in such a *state* as to be a nuisance or injurious to health," and sub-section 4, "any accumulation or deposit which is a nuisance or injurious to health." But, in any event, the defendant Company are within the first proviso of the section (*a*), that, with respect to any "accumulation or deposit necessary for the effectual carrying on" of any business, a person shall not be penalised if it be proved, as has been proved in this case, "that the accumulation or deposit has not been kept longer than is necessary for the purposes of the business," and that the "best available means have been taken for preventing injury thereby to the public health." We submit that the temporary detention of waggons laden with manure for a time reasonably necessary for loading or unloading them at the Company's stations does not constitute a nuisance within the Act.

The complainants can only rely upon either the first or the fourth of the sub-sections of section 107. But it is impossible for them to suggest that, by reason of this traffic in manure, the Company's Lurgan station is within the provision of sub-section 1, under which "any premises in such a state as to be a nuisance or

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injurious to health, shall be deemed to be" a nuisance liable to be dealt with summarily under the Act: see *Reg.* v. *Parlby* (1) where, dealing with the similar provisions of the English Public Health Act of 1875, Mr. Justice Wills says:—"It is clear that the expression 'premises in such a state as to be a nuisance' has not the wide application claimed for it by the respondents, who say that it is answered by any premises on which a nuisance exists. If that were so, the enumeration of, at all events, the several kinds of nuisance specified under heads 2, 3, 4, and 6, would be unnecessary. We do not attempt to define every class of case to which the first head applies, but we think it is confined to cases in which the premises themselves are decayed, dilapidated, dirty, or out of order, &c." Nor does the case come within sub-section 4. Even if this be "an accumulation or deposit" within that sub-section, still at most the annoyance is only temporary and for a lawful and authorised object. "The law, in judging what constitutes a nuisance, does take into consideration both the object and duration of that which is said to constitute the nuisance:" *per* Vaughan Williams, J., in *Harrison* v. *Southwark Water Company* (2); and see *Ball* v. *Wray* (3). [HOLMES, J.: The delivery of coal to a householder might equally, it would seem, amount to a nuisance within sub-section 4 if this is. JOHNSON, J.: Or the loading of manure on the canal barges at Portobello Bridge.] This matter is not within the scope of the provision at all; and, further, if it were, the defendant Company would be freed from liability by the first proviso of the 107th section. For these reasons, we contend, that upon this second point the order of the Justices is certainly bad.

We also rely on the two remaining objections. If such a case as this does come within the scope of the Act, it is not the Company who are responsible, but the persons to whom the manure is consigned. Lastly, the notice to abate is bad, as not specifying the "things required to be done, or works to be executed." The notice simply says, Don't do so and so any more. Upon this point *Reg.* v. *Wheatley* (4) is a decisive authority. The Schedule Forms, both in the English and the Irish Acts, require

(1) 22 Q. B. D. 520, at p. 525.
(2) [1892] 2 Ch. 409.
(3) L. R. 8 Ch. 467.
(4) 16 Q. B. D. 34.

this to be stated both in the notice to abate and in the order of the Justices made thereon.

Bates, and *Stanley*, *Q.C.*, for the Sanitary Authority:—

The main question set out in the Case was that the defendants, being public carriers, were bound to receive the manure or filthy matter at Belfast, to carry it to Lurgan, and there deliver it to the consignees, and while admitting that the "manure" was matter of a very filthy and offensive nature, and a nuisance within the meaning of the Public Health Act, the persons, by whose default the nuisance arose, were the consignees, and not the Railway Company, and, inasmuch as the nuisance arose from the exercise, by the defendants, of their lawful business as carriers, they could not be convicted, or penalised, for doing merely what they were authorised by law to do. Now, the defendants' main contention is that this is not a nuisance within the meaning of the Act.

As to the first point now argued—there are two things which we submit are confused by the appellants—that is, the permission, or authorisation given to them by statute, to carry such matter as manure, which they admit to be most offensive, and, secondly, the statutory obligation that they are under to carry it. This distinction appears clearly upon the judgment of Lindley, L.J., in *Dickson* v. *Great Northern Railway Co.* (1). A Railway Company is authorised to use the statutory powers conferred upon it, and if the exercise of those powers necessarily involve a nuisance they are protected—but the protection stops there. If they could exercise these powers in any reasonable way without causing the nuisance, they must adopt that course: see *The Managers of the Metropolitan District Asylum* v. *Hill* (2). *Truman's Case* (3) does not in any way conflict with or impugn this decision; it shows that if a nuisance be the necessary result of a reasonable user of a Railway Company's powers, the Company is protected, but nothing further. Here the Company could very well carry and deposit this manure at some spot outside Lurgan, where, with equal convenience to the farmers who buy it, the manure could be deposited; and this is what the Justices decided. If the Railway Company had of

(1) 18 Q. B. D. 176. (2) 6 App. Cas. 193. (3) 11 App. Cas. 45.

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themselves refused to deposit the manure, or to load or unload it at Lurgan station, on the ground that it was unreasonable as creating a nuisance, their customers could not force them to do so: *Reg.* v. *Bradford Navigation Co.* (1), distinguishing *Reg.* v. *Pease* (2); see too, *Thomas* v. *Staffordshire Railway Co.* (3). How then can the Company rely upon any statutory duty in this case? [O'BRIEN, J.: The greatest difficulty, it occurs to me, that lies in your way, arises from the terms of the section of the Act. Take the 4th sub-section of section 107; any person of ordinary understanding would say that this was not what was meant by "accumulation or deposit." And the doctrine of *noscitur a sociis* must be applied; but how can you call a load that is brought in order to be taken away an "accumulation"? An accumulation in its ordinary sense is something that is heaped up, that is increasing from day to day, and a "deposit," something that is remaining in the same place; but this manure is not accumulated or deposited, it is delivered.] That is answered by the *Scarborough Case* (4), where the ashes and refuse were only "deposited" in the field for the purpose of being taken away by the farmers who had bought it. [JOHNSON, J.: That case came within the very word used in the section—"deposit."] Then, if the Railway Company cannot be touched, they may create what nuisance they like, and there will be no redress. [HOLMES, J.: If they create a nuisance not authorized by the Acts of Parliament, not only would a civil action lie, but an indictment could be brought against them. But we are dealing here with the question whether this case comes within the narrow terms—as compared with the common law as to nuisance—of the 107th section.] Private individuals have a right to expect that the sanitary authority of their district should take steps on their behalf to remedy a grievance like this.

Upon the other point—for the objection to the form of the notice has not been pressed and could not be, we submit, supported, and the objection that the consignees should have been sued has been practically abandoned, and in view of the *Scarborough Case* (4) is utterly untenable—the argument now put forward is that such a case as the present does not come within the Public Health

(1) 34 L. J. (N. S.) Q. B. 191.
(2) 4 B. & Ad. 30.
(3) 3 Nev. & Mac. 1.
(4) 1 Ex. D. 344.

Act at all. But we submit that sub-sections 1, or 4, of sect. 107, must apply. A wide construction should be given to the Act, and if it be held that the first sub-section only deals with structural matters, then it is easy to instance many nuisances, certainly not coming within the other clauses which, if not captured by the first sub-section, must remain unaffected by the provisions of the statute. If, however, the Court are of opinion that sub-section 1 does not apply, then we submit that the case is within sub-section 4, and that this must be held to be an "accumulation" or "deposit" within the meaning of that clause: see the *Scarborough Case* (1) and *Molloy* v. *Gray* (2).

Campbell, Q.C., in reply.

SIR PETER O'BRIEN, L.C.J.:—

Some questions of very large extent have been discussed in this case, on which we do not consider it necessary to express any opinion, Mr. Stanley having candidly admitted, as was right, that unless he could bring himself within the 107th section, the order of the Justices could not be maintained. The simple question therefore for our decision is whether the alleged nuisance comes within that section. It was first argued that the case came within sub-section 1—"Any premises in such a state as to be a nuisance or injurious to health"; but counsel were forced to abandon this contention and rely on the words of sub-section 4, which speaks of "any accumulation or deposit which is a nuisance or injurious to health." I fail to see, however, how these words, in their ordinary and natural meaning, can apply to such a case as the present. "Accumulation" implies some gradual accretion, a heaping up of matter, increasing from day to day; and "deposit" means something that is put down in some place and left there. Both these words involve the idea of a certain degree of permanency, and cannot, in our judgment, be held to touch the case of loading and unloading manure from the Company's waggons for the purpose of its delivery to the farmers who come to take it. There is nothing in the Act to take these words out of their plain and natural sense;

(1) 1 Ex. D. 344. (2) 28 L. R. Ir. 258.

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in themselves they involve an idea of permanence, and, applying the principle of *ejusdem generis* and reading them in connexion with the other clauses of the section, this is still more strongly borne out, for each of the sub-sections points to something more or less permanent and continued. We are therefore all of opinion that the Justices were wrong, and that the question submitted to us must be answered accordingly, with costs to the appellants.

Solicitor for the complainants: *H. Watson.*
Solicitors for the defendants: *Crawford & Lockhart.*

A. E. R. J.

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Jan. 27.

POWER, TENANT; PRENDERGAST, LANDLORD (1).

Landlord and tenant—Fair rent—Urban holding—Municipal boundary—Land Law (Ireland) Act, 1896 (59 & 60 *Vict. c.* 47), *ss.* 3 (1), 5 (1) (*a*).

The fair rent of a holding, then about a quarter of a mile outside the municipal boundary of the City of Waterford, was fixed in 1882. On the 10th June, 1896, the County Court Judge fixed the fair rent for a second statutory term. In that year the municipal boundary was extended by Act of Parliament, so as to include the holding within the limits of the city. On appeal to the Land Commission:—

Held, that the mere inclusion of the holding within the municipal boundary did not exclude it from the fair rent provisions of the Land Law Acts; and, the Court being of opinion that there was nothing [distinguishing *Perry* v. *Farley* (1894, 2 I. R. 579)] in the appearance of the holding of an urban character, and that its physical character and user had not materially changed since the rent was first fixed;

Held, that a fair rent should be fixed for a second statutory term.

THIS case, heard at Waterford on the 20th January, 1897, now appeared in list for judgment (2). The judgment of Mr. Justice Bewley states the facts and legal questions involved.

(1) Before BEWLEY, J., and FITZGERALD, Q.C., Commissioner.

(2) At the hearing in Waterford, J. J. Feely, solicitor, appeared for the tenant, and Brunskill, instructed by A. Kelly, for the landlords.

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POWER, *Tenant*; PRENDERGAST, *Landlord.*

BEWLEY, J.—

In this case an originating notice was served by the tenant of an application to the Civil Bill Court of the County Waterford to fix a fair rent for a second statutory term. The former judicial rent was £18 per annum, and, by an order dated the 10th June, 1896, the County Court Judge fixed the fair rent for the second statutory term at the annual sum of £14 10*s*.

An appeal having been taken by the landlords, it was contended on their behalf, at the hearing before us, that the holding was not agricultural or pastoral, or partly agricultural and partly pastoral, and, in the alternative, that the judicial rent fixed by the Civil Bill Court should be increased.

By virtue of the provisions of section 3, sub-section (1) of the Land Act of 1896 (59 & 60 Vict. c. 47), no objection to an application to fix a judicial rent for a second statutory term can be allowed which might have been, but was not taken upon the application to fix the judicial rent for the first statutory term, or being then taken was overruled. Therefore, it was not open to the landlords, on the present appeal, to argue that when the judicial rent was fixed for the first statutory term, on the 28th April, 1882, the holding was one to which the fair rent provisions of the Land Act of 1881 did not apply. Their objection to the present proceedings was entirely based on the fact, that during the currency of the first statutory term, viz. in the course of last year, the municipal boundary of the City of Waterford was extended by Act of Parliament, so as to include, for the first time, the holding in this case within the limits of the city, and it was submitted that, as being what was called "an urban holding," it is now excluded from the fair rent provisions of the Land Law Acts.

Perry v. *Farley* (1), in the Court of Appeal, is the authority to be referred to on a question of this kind. There, a holding consisting of one statute acre on the South Circular-road, Dublin, within the municipal boundary, was held to be one to which the fair rent provisions of the Land Act of 1881 did not apply. But the

(1) [1894] 2 Ir. R. 579

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decision in that case was not arrived at merely on the ground that the holding was within the municipal boundary of Dublin. At page 582, the Lord Chief Baron says :—

"I proceed, therefore, to consider the question of pure fact: whether, under the circumstances of this particular case, the holding can properly be described as a farm?

"I take, first, the fact that it is within the municipal boundary of the city of Dublin, and that the landlord, by reason thereof, is liable to pay city rates. I do not think that this circumstance is conclusive. There may be, and I believe there are, in many parts of Ireland, municipal towns, the boundaries of which extend far out into that which, in ordinary language, would be deemed 'country,' as distinguished from 'town'; and I am not to be taken as determining that a holding within such a district, might not be within the Act of 1881. But this particular holding is not only within the municipal limits, but is one which, having regard to its situation as already stated, must, in my opinion, be held as a matter of fact, to be in 'town,' irrespective altogether of municipal limits, and using that word, as I have already used it, in contradistinction to 'country.' It is distinctly urban, and not rural. It is, in fact, a town building-plot, which, pending a demand for it as such, was used as a market garden. Can such a holding with propriety be said to be a farm?" And, at page 586, Fitz Gibbon, L.J., states :—"I am satisfied that all holdings in cities or towns were assumed to be outside the Land Acts. Let me not be misunderstood. By 'in a town' I don't mean inside some imaginary line, such as exists in Sligo or Galway, where a 'municipal boundary'—fixed for franchise or rating purposes —may extend for miles into the open country; but taking common language in its popular sense, this holding of Perry's is, in my opinion, 'in the city'; it is an 'urban holding'; it distinctly has a *town character* ; it has nothing of an agricultural character beyond its temporary use for growing cabbages. Look at its surroundings. The workhouse sheds, the Hospital of the Little Sisters of the Poor, the Royal Hospital, terraces of houses and the like, are its neighbours. All these are significant, but not so strong as the paved pathway that runs in front of it, the gas lamps and the sewers, and what touches the case more nearly still, the liability

to payment of the municipal rates which are assessed upon the very holding itself.

"The Chief Baron has felicitously described it as a building plot let for a market-garden, pending its being taken for building. Its extent, shape, and frontage, its rent and valuation, the fate of the dust-heap plot, all point to the same conclusion. I remember, in my younger days, seeing cabbages growing on vacant plots in Upper Gardiner Street, Hatch Street, and even in Fitzwilliam Place. Did it ever occur to anyone that the character of these holdings was agricultural, because vegetables were grown upon them while the landlords were waiting for someone to come and build upon them? When the Act of Parliament uses popular language, its popular language ought at least to be popularly construed."

I am very familiar with the appearance of the small plot of land on the South Circular-road, Dublin, which was the subject of the proceedings in *Perry* v. *Farley* (1); and Mr. FitzGerald and I, by whom the appeal was heard, visited and walked over the holding in the present case. I am therefore in a position to compare in my mind the physical characteristics of the two holdings; and there appears to me to be a substantial difference between them. The holding in the present case, which is part of the townland called Gibbet Hill, contains 9A. 2R. 25P. statute measure, and lies about a quarter of a mile outside the old municipal boundary of the City of Waterford. It consists of a couple of grass fields about 150 feet or 180 feet above the sea level, very precipitous on the side next the road skirting the Suir. There are a dwellinghouse and offices on it, valued in the tenement valuation at £5 10*s.* per annum, and the fields are used as an ordinary pasture holding. Though the holding, by virtue of an Act of the last session of Parliament, has been made part of the City of Waterford *de jure*, no one, I think, would describe it as part of the city *de facto*. The road which partially bounds it on the south-western side—and is, I believe, called Gallows-road—has about this point a number of cottages such as one sees on the outskirts of any large country town in Ireland, but there is nothing in the appearance of the holding itself of an urban character. The street lamps, which

(1) [1894] 2 Ir. R. 579.

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were looked on in *Perry* v. *Farley* (1) as such strong evidence of a non-agricultural locality do not seem to have yet advanced to this quarter. The physical character and user of the holding do not appear to have changed in any material way since the first judicial rent was fixed in 1882, and unless the transfer by statute of the invisible municipal boundary line from a quarter of a mile to the east to some distance to the west has had the legal effect of depriving the holding of its agricultural or pastoral character, I do not see how the objection to the fixing of a judicial rent can be sustained.

In my opinion the mere inclusion of the holding within the municipal boundary has not excluded it from the fair rent provisions of the Land Law Acts, and I think the County Court Judge was right in fixing a judicial rent for the second statutory term.

The taxation of the holding has no doubt been increased by the change in the city boundary, but on the other hand, we are satisfied from the evidence and the report of our Court Valuers that these lands have a large accommodation value over and above mere proximity value, and this circumstance does not appear to have been taken into account by the valuer of the County Court Judge. Upon the whole, we think that the rent fixed by the County Court Judge was too low, and that the former rent of £18 should be restored.

Solicitor for the tenant: *J. J. Feely.*
Solicitor for the landlords: *A. Kelly.*

D. M'C. M.

(1) [1894] 2 Ir. R. 579.

HINES, LANDLORD; BELL AND OTHERS, TENANTS (1).

Land Com. 1897. March 16.

Land Law (Ireland) Act, 1887, *s.* 7—*Land Law (Ireland) Act*, 1896, *s.* 12; *s.* 50, *sub-s.* 2—*Resumption of possession of holding by landlord—Future tenancy—Reinstatement.*

The reinstatement required by section 50, sub-section (2) Land Law (Ireland) Act, 1896, 59 & 60 Vict. c. 47, to entitle a tenant, possession of whose holding has been resumed by the landlord, to be deemed a present tenant, is not a reinstatement in the holding but in the tenancy existing prior to the eviction.

A superior landlord having recovered judgment in an ejectment for non-payment of rent against his immediate tenant, the notices prescribed by sect. 7 of the Land Law (Ireland) Act, 1887, were duly served on the sub-tenants in occupation. After the time for redemption had expired a writ of possession was issued, and on its execution the physical possession of the lands constituting the holdings of some of the sub-tenants was not disturbed, but they signed agreements in writing to become tenants to the superior landlord of their former holdings, which were therein described as being then in the landlord's possession:—

Held, that the landlord should be treated as having resumed possession of these holdings within the meaning of sect. 50, sub-sect. (2), of the Land Law (Ireland) Act, 1896.

MOTION on behalf of the landlord to have notices to fix fair rents served by Bell and five other tenants dismissed on the ground that the tenants were future tenants.

Campbell, Q.C., and *J. H. Shaw*, for the landlord.

Henry, Q.C., and *Horner*, for the tenant.

The facts are fully stated in the judgment of Bewley, J.

BEWLEY, J.:—

These six cases came before the Court on a motion on behalf of the landlord that the several originating notices to fix fair rents

(1) Before BEWLEY, J., and FITZGERALD, Q.C., Commissioner.

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served by the tenants should be dismissed, on the ground that the tenants are respectively future tenants.

In three cases, viz. those in which Robert John Bell, Andrew Roulston, and Robert Moffatt are the tenants, it is conceded that the motion cannot be resisted; but in the three cases in which George Roulston, James Given, and David Roulston are the tenants it is contended that, having regard to the provisions of the recent Land Act, the tenants are entitled to maintain their applications to have fair rents fixed.

This contention raises some questions of importance which do not appear to be touched by authority.

In and prior to the month of July, 1892, Samuel Bell was tenant to Mrs. Rebecca Jones Hines of the lands of Knockagarron in the county of Donegal, containing 331A. 0R. 27P. statute measure, under a lease dated the 1st November, 1830, at the yearly rent of £126 13*s.* 5*d.*

On the 28th July, 1892, an action to recover possession of the lands for non-payment of one year's rent thereof to the 1st May, 1892, was brought by Mrs. Hines in the Queen's Bench Division of the High Court, and after a trial, judgment was obtained by the plaintiff on the 22nd December, 1892. At the time of these proceedings the several tenants in the cases now before this Court or their predecessors in title were in occupation of parts of the said lands as sub-tenants.

The plaintiff in the ejectment proceedings having elected to take advantage of and proceed under section 7 of the Land Act of 1887, the notices thereunder were duly served on the 24th May, 1893, on the several persons in occupation of the lands, and by virtue of sub-section (2) of that section the persons so served were thereupon to be deemed to be persons put into possession as caretakers.

No application for redemption having been made, a writ of possession was issued on the 29th November, 1893, directed to the sheriff of the county of Donegal, and a return was made thereto to the effect that on the 21st February, 1894, possession of the lands and premises comprised in the writ was given to Mr. John S. Weir, the plaintiff's agent.

When the sheriff and his bailiff attended on the lands on the

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21st February, 1894, the actual possession of the lands now constituting the holdings of Robert J. Bell, Andrew Roulston, and Robert Moffatt, was taken; and these lands were subsequently let to them by certain agreements in writing entered into in the month of March, 1894, under which they are now, admittedly, future tenants. The application to set aside the originating notices in these cases must therefore be granted.

In the cases of William Roulston (the predecessor of George Roulston), Catherine Given (the predecessor of James Given), and David Roulston, the physical possession of the lands was not disturbed, but each of these tenants signed an agreement on the 21st of February, 1894, to take the lands theretofore in his or her occupation on certain terms therein mentioned. The agreements, which differ only in the names of the tenants, the acreage of the holdings, and the amount of the yearly rent, were in the following form:—"This agreement made the 21st day of February, 1894, between Rebecca Jones Hines, of St. Osyth, in the county of Essex in England, widow, of the one part, and (tenant) of Knockagarron in the county of Donegal of the other part. The said Rebecca Jones Hines hereby lets, and the said (tenant) hereby takes, as tenant from year to year from the 21st day of February, 1894, that part of the townland of Knockagarron in the barony of Raphoe and county of Donegal containing acres, roods, perches, or thereabouts, statute measure, with the dwelling-houses and other buildings thereon, all which premises are now in the possession of the landlord . . . at the yearly rent of £ ." And this was followed by provisions of a special character restrictive of subdividing and subletting, conacreing, erecting buildings, &c. Each of these tenants also paid to the landlord's agent a sum of money on the execution of those agreements which in the receipt then given was described as the amount of consideration as fine or input on his receiving possession of his holding.

The tenancy thus created was a future tenancy within the definition contained in section 57 of the Land Act of 1881, and down to the passing of the Land Act of 1896 was undoubtedly excluded from the fair rent provisions of the Land Acts. But Mr. Henry on behalf of the tenants submits that by the joint effect

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of section 50, sub-section 2, and section 12 of the Land Act of 1896, each of these tenants must now be deemed a present tenant for the purpose of an application to fix a fair rent. [His Lordship read section 50 (2) and section 12 (1) and part of (2)].

The following questions appear to me to be involved in this contention:—1. If the provisions of the Land Act of 1896 had been in force at the passing of the Land Act of 1881, would these tenants be now present tenants? 2. Has the landlord, since the passing of the Land Act of 1881, or the 31st December, 1882, resumed possession of the holdings in the present case? or 3. If the landlord has resumed possession, have the tenants redeemed or been reinstated in their former tenancies?

The last of these questions does not seem to present any serious difficulty. The interest of Samuel Bell, the lessee, against whom the ejectment proceedings were taken in 1892, was not redeemed, and without its redemption the interests of the sub-tenants, which were extinguished by the eviction, could not be resuscitated. Nor were the sub-tenants in my opinion reinstated in their former tenancies within the meaning of section 50, sub-section (2). Until the 21st February, 1894, the relation of landlord and tenant had never existed between them and Mrs. Hines, and the effect of the agreements of that date was not to restore them to previously existing tenancies between the same parties, but to create entirely new tenancies between different parties. The reinstatement referred to in the statute is not a reinstatement in a holding, but in a tenancy. The terms of the contracts of tenancy entered into on the 21st February, 1894, differed materially both as to rent and otherwise from those of the tenancies existing prior to the eviction.

The second of the questions above-mentioned must now be considered. When the prescribed notices under section 7 of the Land Act of 1887 were duly served, the sub-tenancies of William Roulston, Catherine Given, and David Roulston were determined, and each of these sub-tenants was thereafter to be deemed to be a person put in possession as a caretaker; and, by sub-section (2) of the section referred to, the enactments of the Landlord and Tenant Act of 1860 (commonly known as Deasy's Act), relating to persons put into possession of lands by the owner as caretakers were made applicable, "as if on the date of the service of the notice a writ of

possession had been duly executed, and such person *having been removed from possession*, had been readmitted as caretaker." Under these circumstances it appears to me that as between these persons and the landlord, the lands must after the service of the notices be treated as being in the legal possession of the landlord. Any application for redemption would be made in the language of section 71 of Deasy's Act in respect of "a claim to be restored to the possession of the premises recovered," and the relief sought would be a writ of restitution of possession. But in the present case we have further the return to the writ of possession executed on the 21st February, 1894, that possession of the lands and premises comprised in the writ had on that day been given to the agent for the landlord; the statement in each of the agreements under which the tenants in these cases claim that the lands, the subject of the letting, were then in the possession of the landlord; and the receipt for the fine paid as on receiving possession of the holding. In my opinion, therefore, these are not cases in which, as between the parties before the Court, we can hold that the landlord has not resumed possession since the passing of the Land Act of 1881, or the 31st December, 1882. It is accordingly unnecessary to express any opinion on the other question above-mentioned, namely, as to whether, if the provisions of the Land Act of 1896, had been in force at the passing of the Land Act of 1881, these tenants would be now present tenants of their holdings.

The application to set aside the originating notices must be granted in all the cases.

Solicitors for the landlord: *Longfield, Kelly, & Armstrong.*
Solicitor for the tenants: *W. P. Moody.*

T. H. M.

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Dec. 16, 17. 1896. Jan. 20.
Appeal. 1896.
March 2. April 28. May 14. June 2.

THE QUEEN at the Prosecution of J. F. MOORE *v.* J. ABBOTT, and in the Matter of an intended Rifle Range and Camp at Kilbride, in the County of Wicklow, and the Defence Acts, 1842 to 1873, the Ordnance Board Transfer Act, 1855, the Ranges Act, 1891, and the Lands Clauses Acts (1).

Defence Acts, 1842 *to* 1873—*Rifle range and camp—Land taken compulsorily—Land injuriously affected—Severance—Accommodation works—Compensation—Arbitration—Statute—Incorporation—Contrary intention—The Ranges Act*, 1891 (*54 & 55 Vict. c.* 54), *s.* 11—*The Defence Act*, 1842 (*5 & 6 Vict. c.* 94)—*The Lands Clauses Consolidation Act*, 1845 (*8 Vict. c.* 18)—*The Railways Act* (*Ireland*), 1851 (*14 & 15 Vict. c.* 70)—*Railways Act* (*Ireland*), 1860 (*23 & 24 Vict. c.* 97)—*Lands Clauses Consolidation Amendment Act* (*23 & 24 Vict. c.* 106)—*Defence Act*, 1860 (*23 & 24 Vict. c.* 112)—*Railways Act* (*Ireland*), 1864 (*27 & 28 Vict. c.* 71)—*35 & 36 Vict. c.* 68—*48 & 49 Vict. c.* 36—*The Interpretation Act*, 1889 (*52 & 53 Vict. c.* 63), *s.* 23—*Barracks Act*, 1890 (*53 & 54 Vict. c.* 25)—*The Military Lands Act*, 1892 (*55 & 56 Vict. c.* 43)—*Mandamus—Liability of the Crown to costs.*

The Principal Secretary of State for the War Department served the prosecutor with a notice entitled, "In the Matter of an intended Rifle Range at K. in the Co. of W. and in the Matter of the Defence Acts, 1842 to 1873, the Ordnance Board Transfer Act, 1855, and the Ranges Act, 1891, section 11," stating that he required for the public service certain lands of which the prosecutor was owner, and offering a sum of money for the same; the notice proceeded to inform the prosecutor that if he refused the offer so made, the Principal Secretary would take all necessary measures pursuant to the Defence Acts, 1842 to 1873, for obtaining possession of the lands, and would require that the compensation to be paid for the same should be settled by arbitration pursuant to section 11 of the Ranges Act, 1891, and not by reference to a jury, and also that the Principal Secretary would take all necessary steps to have an arbitrator appointed pursuant to the statutory powers in that behalf, and to have the said compensation determined by such arbitrator pursuant to the same statutes. The prosecutor did not accept the sum so offered. The War Department lodged maps and plans, &c. under section 3 of the Railways (Ireland) Act, 1851: the Commissioners of Public Works appointed the defendant as arbitrator, and a

(1) Before Sir P. O'Brien, L.C.J., and O'Brien and Gibson, JJ.

notice entitled in the matter of the several Acts, mentioned in the title to the former notice, with the addition of the Lands Clauses Acts, was served on the prosecutor informing him that the maps and plans, &c. had been lodged pursuant to the provisions of the Railways (Ireland) Act, 1851, relating to the lands to be acquired under the Defence Acts, 1842 to 1873, for the purpose of a rifle range and camp; that the defendant had been appointed arbitrator between the Secretary of State and the persons interested in the said lands, and would sit on a day named to inquire into and adjudicate upon all claims in respect of any interest in the said lands in the manner provided by the above mentioned Acts and the other Acts relating thereto. The prosecutor attended at the inquiry and claimed, in addition to the compensation for the actual taking of the lands, (*a*) compensation in respect of other lands (not taken) being injuriously affected by the execution of the works necessary for the preservation of the rifle range and camp, (*b*) compensation for severance, and (*c*) accommodation works. The defendant held that he had no jurisdiction to award any compensation except for the taking of the lands, and that he had no jurisdiction to order any accommodation works to be erected. The prosecutor applied to the Queen's Bench Division for a mandamus to compel the defendant to inquire into and adjudicate upon and assess the compensation in respect of the several matters claimed, and also to determine what accommodation works the prosecutor was entitled to:—

Held (by the Queen's Bench Division and on appeal by the Court of Appeal), that in the case of land compulsorily acquired under the Defence Acts, the contrary intention, appearing in sect. 11 of the Ranges Act, 1891, negatived the incorporation (by virtue of the Interpretation Act, 1889, s. 23) of the Railways (Ir.) Act, 1851, with the Lands Clauses Act, 1845; that accordingly the machinery of the Act of 1845, not that of the Railways (Ir.) Act, 1851, should have been adopted for the purpose of ascertaining by arbitration the compensation to be paid; that thus the defendant not being properly appointed arbitrator, the proceedings were *coram non judice*; and that, therefore, the mandamus should be refused.

Held also (by the Queen's Bench Division), that where lands were so compulsorily acquired by the War Department for the purpose of a rifle range and camp, the owner of the lands taken would be entitled to compensation in respect of the injury (if any) to his adjoining lands injuriously affected by the execution of the works of the Secretary of State in the construction and formation of the rifle range and camp.

Quaere.—Whether the Crown was liable to the costs of the proceedings.

MANDAMUS. Motion to make absolute a conditional order for a writ of mandamus, directed to Mr. Joseph Abbott, Government Arbitrator, commanding, "that he do forthwith proceed to inquire into and adjudicate upon and assess the compensation, if any, to be paid to Joseph Fletcher Moore, the applicant, by reason of certain lands of the applicant's situate . . . in the parish of Kilbride, and

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county of Wicklow . . . being injuriously affected by the execution of the works of the Secretary of State for War in the construction and formation of" a certain rifle range and camp at Kilbride; "and by reason of the severing of the lands taken for the purpose of said rifle range and camp from the other lands" of the said J. Fletcher Moore, "or otherwise injuriously affecting such other lands by the exercise of the powers of the Secretary of State for War in the premises"; and "to inquire and determine what works, if any, should be made and maintained by the Secretary of State for War for the accommodation of the lands of the said J. Fletcher Moore adjoining the lands" so taken, and duly to make his award in the premises.

The applicant, who was the owner of certain lands near the Manor of Kilbride, in the county Wicklow, was served with notice under section 19 of the Defence Act, 1842, on behalf of the Secretary of State for War, dated the 13th November, 1894, treating for the absolute purchase of part of said lands, the notice being entitled—"In the Matter of an intended Rifle Range and Camp at Kilbride, in the county of Wicklow, and in the Matter of the Defence Acts, 1842 to 1873, the Ordnance Board Transfer Act, 1855, and the Ranges Act, 1891, section 11"—and directed to the applicant and others, offering the sum of £5085 as the consideration for the absolute purchase thereof, and notifying that, in case of refusal, the Secretary of State "will take all such measures as may be necessary pursuant to the powers and provisions of one or all of the Defence Acts, 1842 to 1873, for obtaining immediate possession of such lands, hereditaments, houses, and buildings. And also will require that the compensation to be paid for the said lands and hereditaments, houses and buildings, shall be settled by arbitration pursuant to the 11th section of the Ranges Act, 1891, and not by reference to a jury. And the said Principal Secretary will take all necessary steps to have an arbitrator appointed pursuant to the statutory powers in that behalf, and to have the compensation to be paid . . . determined by such arbitrator pursuant to the same statutes."

The applicant and some of the occupiers having declined the offer so made, the War Department caused notice, dated the 4th March, 1895, to be served on the applicant, entitled in the same matters as the former notice, but adding "the Lands Clauses

Acts" thereto, stating that, "pursuant to the provisions of the Railways (Ireland) Act, 1851 (14 & 15 Vict. c. 51), and the Acts making perpetual and amending the same," maps, schedules, &c., relating to these lands, which the Secretary for War proposed "to acquire under the Defence Acts, 1842 to 1873," were deposited with the Commissioners of Public Works, &c., and that the Commissioners had appointed Joseph Abbott (the respondent) to be arbitrator, "to inquire into and adjudicate upon the value of the said lands specified in said" maps, schedules, &c. "and the several interests in said lands, the purchase money to be paid for said lands, and the compensation to be paid for injury to any lands injuriously affected by the execution of the works of the said Secretary of State, and to inquire and determine what works should be made and maintained by the said Secretary of State for the accommodation of adjoining lands." The notice called on all persons claiming any right or interest in the lands taken, or claiming any compensation for any injury to any lands injuriously affected by the execution of the works of the said Secretary of State, or claiming to have any works made and maintained by the said Secretary of State for the accommodation of lands adjoining the said lands, to send in a statement of their claims. The notice stated that the arbitrator would sit to hear all such claims on the 18th April, 1895.

After service of this notice, the Secretary of State on the 18th March, 1895, entered into immediate possession of the lands, and during that year used them (it was stated), for the purpose of a rifle range, and caused the shooting and grazing thereon to be let.

The applicant, in the affidavits on which the conditional order was grounded, stated that the lands so taken consisted principally of mountain land, portion of a large grouse shooting; that the arbitrator sat in April and May, 1895, and heard evidence on both sides as to the value of the lands taken, and of the turbary thereon, and of the shooting on the lands actually taken, and also of the damage done to the shooting on the adjoining lands by the taking away of the part so acquired, as rendering the shooting smaller and much less valuable, and also of the damage to the adjoining shooting by the firing, the birds being thereby scared

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from the immediately adjoining shooting, and of other injuries to the adjoining shooting from such severance, and of consequential injury thereto, and of the necessity of accommodation works such as fences; that counsel for the Secretary of State objected that all that the arbitrator could in law do was to award compensation for the lands actually taken, and the shooting and turbary thereon, and not for injuries to the adjoining lands by severance, nor for consequential injury thereto, nor for injury arising from the future user of the land taken as a rifle range, and that he could not direct accommodation works to be made; that the arbitrator reserved his decision on the matter, and on the 2nd July, 1895, made his Draft Award, by which he awarded £3577 4*s*., but made no award in respect of severance, or for injuriously affecting adjoining lands, though, as the applicant alleged, injury by severance and consequential injury had been admitted; that, at the hearing of objections to the Draft Award, applicant's counsel objected that the amount awarded was too small, that nothing had been allowed for severance and consequential injury to the adjoining lands and the shooting thereon, that no accommodation works had been directed, and that no sum had been awarded for compulsory purchase; that the arbitrator stated that he had adopted the argument of counsel for the Secretary of State, and held that he had no jurisdiction, and declined, therefore, to award compensation for severance or for consequential injury to the adjoining lands and shooting, or to order any accommodation works to be made, or to give any sum for compensation for compulsory purchase; and that it was then agreed that the hearing of objections to the Draft Award should be adjourned till December, so as to allow the applicant to bring the matter before the Court.

The arbitrator, in an affidavit filed as cause against the order, alleged that the affidavits of the applicant did not accurately represent what occurred at the hearing before him or his adjudication; that the applicant's claims were—(*a*) a claim for compensation for lands taken, including the shooting and turbary thereon, his right to such compensation being admitted by the Secretary of State for War, the only question at issue between them being as to the amount; (*b*) a claim for damage to the shooting

on his adjoining lands not taken, by reason of the rifle practice, and the construction of the butts on the lands taken; (*c*) a claim for damage to the lands not taken, by reason of the severance of the lands taken; and (*d*) a claim for accommodation works, viz. fences and a protecting wall between the lands taken and his adjoining lands; that full evidence was given on behalf of Mr. Moore in support of his claims, and on the whole case likewise on behalf of the Secretary for War; that it was arranged by consent that any legal questions that arose or affected the case should be discussed and considered after all evidence had been taken; that after the evidence at both sides had closed counsel for the Secretary for War submitted the following legal contentions:—1, That the only compensation that could be awarded was that prescribed by the Defence Act of 1842, viz. compensation for the absolute purchase of the lands taken, the Ranges Act, 1891, section 11, merely substituting a public arbitrator as the tribunal for assessing the compensation instead of a jury, but not extending or altering the subject-matters in respect of which the compensation should be awarded; 2, that, assuming the arbitrator to be bound to award compensation as prescribed by the Lands Clauses Acts, and the Railways (Ireland) Act, 1851, damage to the shooting on Mr. Moore's lands not taken by reason of the rifle practice and signalling on the lands taken, was not a subject-matter of compensation, inasmuch as it was caused by the lawful and proper user of the lands as a rifle range, and not by the construction of any works upon them, and that as regards the alleged damage done to the adjoining lands by works constructed on the lands taken, the butts, which were the only works constructed on the lands taken, caused, in fact, no damage to the adjoining lands not taken or the shooting thereon; 3, that as regards injuries to the lands not taken, by severance of the lands taken, they argued that such damage was not the subject of compensation within the Defence Act, 1842; further that, assuming that the case was to be dealt with under the Lands Clauses Acts and the Railways (Ireland) Act, 1851, no such damage by severance was proved as a fact; 4, that the claim for accommodation works was outside the purview of the Defence Act, 1842,

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and that, assuming there was jurisdiction to deal with this matter under the Lands Clauses Act and the Railways (Ireland) Act, 1851, still, on grounds of public policy it could never be supposed that an arbitrator would be justified in prescribing to the military authorities the works they were to execute in their management and control of such rifle range, the Legislature leaving with such authorities both the responsibility and the power of managing the rifle range with due regard to the safety of the public and the rights of adjoining owners and occupiers; that, having heard counsel on both sides, the arbitrator ruled as follows:—1, he awarded compensation for the purchase of the lands taken, and for the game and turbary thereon; 2, assuming jurisdiction to exist to award compensation as prescribed by the Lands Clauses Act and the Railways Act (Ireland), 1851, for injury to lands injuriously affected by the execution of the works of the Secretary for War, or for otherwise injuriously affecting such lands by the exercise of the powers of the Secretary for War, the arbitrator ruled that damage to the shooting on Mr. Moore's adjoining lands not taken, by reason of the rifle practice or signalling on the land taken, was not a subject-matter of compensation inasmuch as such damage, if it occurred, would be caused by the lawful and proper user of the lands as a rifle range; but he ruled that the Defence Act of 1842 governed the case and excluded such compensation; 3, assuming that he was bound under the Lands Clauses Acts and Railways (Ireland) Act, 1851, to award compensation for damage to Mr. Moore's lands not taken by severance of the lands taken, he found as a fact that no damage was so caused to the lands or to the game or shooting thereon, but he ruled that such compensation was excluded by the Defence Act of 1842; 4, assuming that he was bound under the Lands Clauses Acts and the Railways (Ireland) Act, 1851, to inquire and determine what works should be made and maintained for the Secretary for War for the accommodation of lands adjoining the rifle range, the arbitrator ruled that no case for such accommodation works was made out on the evidence to justify him in prescribing to the Secretary for War the accommodation works claimed or in interfering with the exercise of the duties, responsibilities, and powers of the Secretary of State in

the regulation, management, and control of the rifle range; but he held that this claim for accommodation works was excluded by the Defence Act, 1842.

The arbitrator then stated that, at the instance of counsel for Mr. Moore, he abstained from actually ruling or expressing a final opinion "whether any or what damage has been or will be caused to Mr. Moore's adjoining lands and shooting by the user of the lands taken as a rifle range"; that he abstained from giving any determination on this point as counsel for Mr. Moore intimated that the finding, if adverse, would be on a question of fact which would or might preclude him from taking the opinion of the Court on the questions of law above adverted to. The arbitrator denied that the witness for the Secretary for War gave any evidence to the effect that Mr. Moore's adjoining lands or the shooting thereon were or would be injured or damaged by the severance of the lands taken or the lessening in size of the shooting, or that he estimated any money compensation for such alleged loss; he stated that the only injury to shooting on such adjoining lands deposed to by that witness was the possible damage from the scaring of birds thereon by the firing on the rifle range; that the evidence for the Secretary for War did not admit any injury by such severance, or injury thereby to Mr. Moore's adjoining lands or shooting, and that the witness did not place any money value on such injuries [on these matters the parties were at issue]. The arbitrator added that he had, as a matter of fact, in assessing the compensation payable to Mr. Moore, borne in mind that the purchase was compulsory, and had estimated the compensation accordingly; that it was not argued, and that he did not rule that compensation should not be awarded for any damage which would arise from anything subsequent to the actual taking of the lands; and that in adjourning the hearing of the objections to the Draft Award he did so at the instance of Mr. Moore's counsel to give him an opportunity of bringing before the Court such of the arbitrator's rulings on the matters herein as he might be advised.

The applicant, in an affidavit in reply to the preceding, stated that he had understood and believed that the arbitrator had ruled in favour of the contention for the Secretary of State, namely, that, under the Defence Act, 1842, he had no jurisdiction to award

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compensation for damage by severance, or by injuriously affecting lands not taken, or to award accommodation works; that the Ranges Act, 1891, section 11, conferred no jurisdiction to award compensation in respect of such matters; and that he had not understood that the arbitrator ruled or found as a matter of fact that no damage was caused to the lands not taken, or had ruled that there was no case for accommodation works, or that he could not interfere with the Secretary of State in the control of the range; that the applicant understood the arbitrator to rule merely that he had no jurisdiction in respect of these matters, and did not enter on the consideration of the question of fact, leaving it open pending the application to the Court on the question of jurisdiction.

The arbitrator's draft award, dated 2nd July, 1895, and entitled in the same way as the notice of 4th March, 1895, recited the proceedings taken under the Railways Acts (Ireland) 1851, 1860, and declared that the arbitrator having proceeded to inquire into and adjudicate upon the value of the lands required for the purposes of the said War Department, and specified in the said maps or plans, and the several interests in such lands, in respect of which no agreement may have been come to between the said War Department and the several persons entitled thereto, and upon the purchase-money to be paid for such lands, and upon the compensation to be paid for injury to any lands injuriously affected by the execution of the works of the said War Department; and having also inquired and considered what works should be made and maintained by the said War Department for the accommodation of lands adjoining the said works, awarded that the prices to be paid by the said War Department for the purchase of the several interests in the lands were those specified and described in the schedule—in the column headed "*value of interest and purchase-money to be paid for same*"—opposite the names of the persons interested therein [the total being £3577 4*s*.] (1); and that the sums to be paid for compensation for injury done, or to be done, to any lands held together with such lands respectively in the said schedule specified,

(1) It was stated at the bar that the difference between this figure and the sum of £5085 originally offered was mainly due to the influence upon the latter estimate of a consideration of damage by severance and consequential injury.

by reason of severance or otherwise injuriously affecting such other lands, or for lands injuriously affected (no parts whereof are proposed to be taken) by the exercise of the powers of the said War Department, were set forth in the column in the schedule, headed "*compensation to be paid for damage by severance or for injuriously affecting lands by execution of works of the War Department*," opposite the names of the parties respectively interested therein. No compensation was awarded in this column.

Counsel for Mr. Fletcher Moore now moved to make absolute the conditional order directed to the arbitrator in the terms given on page 363.

For convenience, the principal statutory enactments referred to in the arguments or the judgments are here summarised.

The Defence Act, 1842 (5 & 6 Vict. c. 94 (1)), provides (sect. 16) that the Principal Officers of Her Majesty's Ordnance (in whom lands to be taken under the powers of that Act were vested) may cause to be surveyed, and may treat with the owners for the absolute purchase, or the temporary possession, of "any lands, buildings, or other hereditaments or easements wanted for the service of the Ordnance Department, or for the defence of the realm"; and, by sect. 19, where the owners do not agree, or refuse to accept the sum "offered for the absolute purchase of such lands, buildings, or other hereditaments, or such annual rent or sum as shall be offered for the hire thereof," then such Principal Officers may require two Justices, or &c., to put them into immediate possession thereof, and to direct the sheriff to summon a jury, and such jury shall "find the compensation to be paid either for the absolute purchase of such lands or buildings, or other hereditaments, or for the possession or use thereof, as the case may be." [This section contained a proviso against user for barracks, repealed 22 Vict. c. 12, s. 4.] By sect. 20, either party, if dissatisfied with the verdict of such jury, may apply to the Court of Exchequer, suggesting that they have reason to be dissatisfied with such verdict, and to have the verdict of such jury returned into that Court, and if it appear to the Court to be proper, such suggestion shall be entered,

(1) Sections 1–4, 7 (in part), 9 (in part), 11, 35, 38, are repealed: Stat. Law Rev. Act, 1874 (No. 2). Preamble repealed, Stat. Law Rev. Act, 1888 (No. 2).

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and a writ directed to the sheriff to summon a common or special jury for the next assizes, or sittings of Nisi Prius, "and the compensation to be paid either for the absolute purchase, or &c., of such lands, buildings, or other hereditaments shall, at such assizes or sittings be ascertained by such jury . . . and the verdict of such jury shall be returned into the said Court of Exchequer, and shall be final and conclusive," a power, however, being reserved to the Court, on application to be made within four days after the commencement of the succeeding term, "to order any new trial in relation thereto." Section 21 requires any jury so impanneled to ascertain the proportions to be paid out of such compensation to persons interested as lessees or otherwise in any such lands, &c. By section 23, no lands are to be so taken without the consent of the owners, unless the necessity or expediency of taking the same shall be first certified by the Lord Lieutenant of the county (or, &c.) in which such lands lie, and unless the taking thereof be authorized by the Commissioners of the Treasury.

The Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), provides (sect. 6) that the promoters of an undertaking, as defined by the Act, may purchase lands by agreement, and, with respect to the purchase of lands otherwise than by agreement, section 18 provides that the promoters shall give notice "to all the parties interested in" the lands required to be purchased, stating that they "are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works." If the parties fail to treat, or in case of dispute, then, by ss. 21 and 28, in cases where the amount claimed does not exceed £50, "the value of such lands"—*i.e.* "lands taken or required for, or injuriously affected by the execution of the undertaking"—"or of any interest therein, or as to the compensation to be made in respect thereof," shall be settled by two justices. By section 23, where the compensation claimed or offered exceeds £50, the claimant may by notice require to have the same settled by arbitration, in which case (by section 25), unless both parties concur in the appointment of a single arbitrator, each party shall nominate one and (by section 27), such two arbitrators shall appoint an umpire. If no such notice be given, then, by section 38, the promoters

shall issue to the sheriff their warrant requiring him to summon a jury, and an inquiry shall be held before the sheriff and such jury, in respect of the compensation or damage claimed. By section 49, "where such inquiry shall relate to the value of lands to be purchased, and also to compensation claimed for injury done, or to be done, to the lands held therewith, the jury shall deliver their verdict separately," for the amount of the purchase money, and for the amount "of compensation for the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands by the exercise of this or the special Act, or any Act incorporated therewith." Section 63 provides that, "in estimating the purchase money, or compensation to be paid . . . regard shall be had . . . not only to the value of the land to be purchased or taken . . . but also to the damage, if any, sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands." Section 68 provides, that "if any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for, or injuriously affected by, the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction . . . and if the compensation claimed in such case shall exceed the sum of £50, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit . . . "

The Railways (Ireland) Act, 1851 (14 & 15 Vict. c. 70) ("an Act to alter and amend certain provisions of the Land Clauses Act 1845, so far as relates to Ireland"), recites in the preamble (1)—"Whereas, on account of circumstances connected with the tenure of land in Ireland, the provisions of the Land Clauses Consolidation Act, 1845, are found to be unsuited to the existing condition of that country, and it is expedient that some provision should be made for ascertaining the purchase money or compensation to be paid by Railway Companies in Ireland, for the lands required for their undertakings, and for determining

(1) Preamble repealed by the Statute Law Revision Act, 1892.

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differences with respect to the works to be made and maintained by such Companies for the accommodation of the owners and occupiers of lands adjoining such railways." Section 2 provides that the Act shall apply to every railway in Ireland authorized to be made "by any subsequent Act"; and section 3 provides that "the clauses of 'the Lands Clauses Consolidation Act 1845,' with respect to the purchase and taking of lands otherwise than by agreement, except sections 16 and 17 of the said Act, shall not be applicable or in force with respect to any railway or portion of a railway in Ireland to which this Act applies." Section 4 provides that when "any Company authorized to make a railway to which this Act applies shall require to purchase or take any lands which they are by the Special Act authorized to purchase or take, the Company shall make and deposit maps and plans, with estimates of the gross annual value and the value in fee of such lands so required to be taken . . . and for the purchase of which, or of all the several interests in which, the Company shall not have contracted," and the separate value of the several interests therein, "so far as the same can be reasonably ascertained (taking into consideration damage by severance and any other matters by the Lands Clauses Consolidation Act, 1845, required to be considered if necessary)." By section 5, the Commissioners of Public Works, on the application of the Company, shall appoint an arbitrator . . . "and such arbitrator shall, in relation to the lands required and the works to be made and maintained by the Company, as herein mentioned, be the arbitrator under this Act." By sections 8 and 9, the arbitrator shall, after notice given, "proceed to inquire into and adjudicate upon the value of the lands required for the purposes of the railway . . . and the purchase-money to be paid for such lands and the compensation to be paid for injury to any lands injuriously affected by the execution of the works of the Company, and to inquire and determine what works should be made and maintained by the Company for the accommodation of lands adjoining the railway," and the arbitrator shall make a draft award dealing with these matters and awarding separate sums in respect of the purchase of the lands and in respect of "the damage (if any) to be sustained by reason of the severing of the lands taken from the other lands, or otherwise injuriously

affecting such other lands by the exercise of the powers of the Company"; and after hearing any objections taken, he shall make his final award, "and every such award shall be binding and conclusive, subject to the provisions concerning traverse hereinafter contained, upon all persons whomsoever." The Company may (by section 16), on payment of the certified amount payable for compensation, take possession, or (by section 22), after the draft award is made, may, on deposit of such amount as the arbitrator thinks fit, enter upon the lands. Section 26 provides that the claimant, if dissatisfied with the award, may on notice to the Company of the amount or the accommodation works intended to be claimed, have a traverse for damages entered in the Crown Book in respect of such claim, and thereupon such traverse shall be tried in like manner, as in the case of traverses for damages under the Grand Jury laws; provided "that no party shall have any other remedy for the purpose of impeaching the amount of any price or compensation ascertained by any such award as aforesaid, or the sufficiency of the accommodation works awarded thereby, other than by means of such traverse as aforesaid, anything in any Act to the contrary notwithstanding; provided also, that the jury . . . shall be sworn a true verdict to give whether any and what damages will be sustained by the traverser, regard being had to the value of the lands of such traverser required and to the injury to any lands of such traverser injuriously affected by the works of the Company, or (as the case may be), as to what accommodation works ought to be made and maintained by the Company for the accommodation of the lands of the traverser." Section 27 provides that the entry of the verdict shall be "a final decision, and binding upon all parties interested, and shall have the effect of a judgment at law in the Queen's Bench, and may be enforced by like remedies"; and by section, 29, "all the provisions of the 'Lands Clauses Consolidation Act, 1845,' shall, subject to the provisions herein contained, extend to and be taken as part of this Act except so far as the same are inconsistent therewith."

The 17 & 18 *Vict. c.* 67 (1854), empowers the Principal Officers of Her Majesty's Ordnance to purchase commonable rights, and for that purpose (if they think proper) to use all the powers and pro-

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visions of the Lands Clauses Act, 1845, "for the purpose of ascertaining making and paying compensation for" the extinguishment of commonable rights affecting any lands taken under the Defence Act 1842, and they shall be deemed "promoters," within the Act of 1845, provided that nothing herein contained shall prejudice or affect the powers and authorities conferred by the Act of 1842.

By *The Ordnance Transfer Act*, 1855 (18 & 19 Vict. c. 117), all the powers of the Principal Officers of Her Majesty's Ordnance were vested in the Secretary of State for War.

The Railways Act (*Ireland*), 1860 (23 & 24 Vict. c. 97), makes perpetual the Act of 1851, subject to certain amendments, including a repeal and re-enactment, with modifications, of sections 22, 23, and 24, and a provision for the costs of a traverse, costs given against a traverser to be deducted from the amount of purchase-money, or to be recoverable by distress in like manner as provided by section 53 of the Lands Clauses Consolidation Act, 1845, with respect to costs payable to promoters.

The Lands Clauses Consolidation Act Amendment Act, 1860 (23 & 24 Vict. c. 106), by section 7, provides, that for the purchase or acquisition of lands wanted for the service of the Admiralty or War Department, or for the defence of the Realm, "it shall be lawful" for the Secretary for War "to use all or any of the powers and provisions by the Lands Clauses Consolidation Acts, 1845, given to promoters of the undertaking as therein mentioned," and that for such purposes the Secretary for War shall be deemed and taken to be the promoters of an undertaking within the meaning of the said Act, and all the powers and provisions thereof shall, if used, be treated as if contained in 5 & 6 Vict. c. 94, for the purpose of being used and made available by the Secretary for War, provided always that this section shall not authorize any purchase otherwise than by agreement of any land except according to the provisions of section 23 of 5 & 6 Vict. c. 94, or prejudice or affect the powers and authorities of the Secretary for War under that Act, or the Ordnance Transfer Act. Section 8 provides, that this Act shall be read and construed as part of the Lands Clauses Consolidation Act, 1845, in all matters in which it relates thereto.

The Defence Act, 1860 (23 & 24 Vict. c. 112)—which appears

to have been framed originally for the purpose of acquiring certain lands in the vicinity of the Royal Arsenals and of certain ports —by section 46 amends the provisions of the Defence Act, 1842, as to the mode of service of notices on owners, lessees, and occupiers, as to the determination of the amount of compensation for lands taken otherwise than agreement; as to certain provisions concerning the payment and application of such compensation, and as to interests omitted to be purchased. The determination of the amount of compensation of lands so taken is, however (ss. 12, *et seqq.*), to be settled by a jury in like manner as if same were compensation for lands surveyed and marked out under the Defence Act, 1842, unless where the compensation claimed does not exceed £200, when it shall be settled by two Justices. Section 29 provides that, "as well in regard to lands required to be kept free from buildings, as in respect of lands taken under this Act," the Secretary of State may avail himself of all or any of the powers and authorities given by the Lands Clauses Consolidation Act, 1845.

The Volunteer Act, 1863 (26 & 27 Vict. c. 65, E.), provided (Part 5, ss. 31-40—"Acquisition of Land for Ranges"(1)) for the acquisition of land by volunteer corps, with the assent of the Secretary for War, and for the incorporation therewith of so much of the Lands Clauses Act, 1845, as related to purchase by agreement, and gave the Secretary for War power to make bye-laws for the regulation of such lands. [This Act repealed the earlier Volunteers Acts (see Schedule), including The Rifle Volunteer Grounds Act, 1860 (23 & 24 Vict. c. 140, E.), which contained similar provisions.]

The Railways Act (*Ireland*), 1864 (27 & 28 Vict. c. 71), amends the Act of 1851, by providing (s. 1) that the Company, if dissatisfied, in cases exceeding £500, may traverse the award, by giving power (ss. 2 and 3) to have a special jury, and a view jury, and providing (ss. 5-10) that either party, if dissatisfied with the ruling of the Judge upon any matter of law at the trial of such traverse, may, on giving to the Judge, at the time of such trial, a note of their objection and the grounds thereof, appeal, by way of special

(1) Repealed 55 & 56 Vict. c. 43, sched.

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case to one of the Superior Courts, as the Judge may direct, and the judgment or order of such Court upon the Special Case shall be equivalent to a judgment of such Court in a personal action between the parties, the cost of such proceedings, where the Company is respondent, to follow the event and to be included in the ultimate judgment of the Court of Appeal. Sect. 13 provides that in the construction of the Railways Acts (Ireland), 1851, 1860, 1864, the expression "Company" shall include any parties, whether company, underdertakers, commissioners, drainage board, corporation, or private persons empowered to execute any work or undertaking, or to take any lands compulsorily; and section 15 provides for fences for separating lands taken by a Railway Company from the adjoining lands not taken, to be made within five years.

The Railways Traverse Act, 1868 (Ireland) (31 & 32 Vict. c. 70), provides for trial of traverses under the Railway Acts (Ireland), in a county other than that in which the lands are situate.

The Military Forces Localization Act, 1872 (35 & 36 Vict. c. 68), provides (section 2) that for the purposes of the Act, the Secretary of State may acquire such lands and execute such works as he may deem expedient, and (section 3), that with this view the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, in this Act referred to as "the Lands Clauses Consolidation Acts," shall be incorporated with this Act, subject to certain provisions (including a Local Inquiry and an Act of Parliament). Section 13 contains a saving of all powers of acquiring land vested in the Secretary for State by other Statutes. Section 14 provides that in the application of this Act to Ireland the term "Lands Clauses Consolidation Acts" shall mean "the Lands Clauses Consolidation Act, 1845," as the same is amended by "The Railways Act (Ireland) 1851," "The Railways Act (Ireland), 1860," "The Railways Act (Ireland), 1864," and "The Railways Traverse Act."

The Artillery and Rifle Ranges Act, 1885 (48 & 49 Vict. c. 36), extended the powers to make bye-laws contained in the Volunteer Act 1863, to the case of land taken by the Secretary for War for like purposes for other portions of Her Majesty's forces. Section 3 contained a substantive enactment, "where any land, the use of which can be regulated under this Act, abuts on any sea, or tidal water, this Act" shall apply thereto, provided if any bye-

law injuriously affects any person's rights over such tidal waters or adjoining shore, he shall be entitled to compensation, and "such compensation in case of difference shall be ascertained in manner provided by the Lands Clauses Acts with respect to the compensation for land taken otherwise than by agreement." Section 7 defines "Lands Clauses Acts" ("unless the context otherwise requires") to mean "as regards England and Ireland, the Lands Clauses Consolidation Act, 1845, and the Acts amending the same in England and Ireland respectively (1)."

The Drill Grounds Act, 1886 (49 Vict. c. 5), extends the provisions of the Volunteer Act, 1863 (part 5, sections 33 to 36), by permitting persons and corporations to grant lands to volunteer corps, or to the Secretary for War, for military drill or any military purpose of such volunteer corps or any other portion of Her Majesty's military forces (2).

The Interpretation Act, 1889 (52 & 53 Vict. c. 63), section 23, provides, "In any Act passed after the commencement of this Act, unless the contrary intention appears, the expression 'Land Clauses Acts' shall mean, . . . (*c*) as respects Ireland, The Lands Clauses Consolidation Act, 1845; The Lands Clauses Consolidation Amendment Act, 1860; The Railways Act (Ireland), 1851; The Railways Act (Ireland), 1860; The Railways Act (Ireland), 1864; and the Railways Traverse Act, and any Acts for the time being in force amending the same."

The Barracks Act, 1890 (53 & 54 Vict. c. 25), conferred power on the Secretary of State for War to acquire lands and execute such works as he might deem expedient for the purpose of building and enlarging barracks and camps, and for facilitating the training of troops, and with this view provided (section 2), that "the Lands Clauses Acts" shall be incorporated with this Act, subject to certain qualifications, and a proviso that "the word 'lands' shall in this Act and the incorporated Acts include any easement in lands." By section 4 it is provided that "where land is acquired under the Defence Act, 1842, and the Acts amending the same, the compensation to be paid for the land may, if both parties agree, be settled by arbitration instead of by a reference to a jury, and thereupon

(1) The whole Act, except sect. 3, is repealed, 55 & 56 Vict. c. 43, sched.

(2) The whole Act is repealed, 55 & 56 Vict. c. 43, sched.

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the provisions of the Lands Clauses Acts shall apply as in the case of an arbitration under those Acts."

The Ranges Act, 1891 (54 & 55 Vict. c. 54), ("an Act to facilitate the acquisition of ranges by volunteer corps and others") provides, section 10, "for the purpose of purchase of land by a volunteer corps under this Act, the Lands Clauses Acts shall be incorporated with this Act," with certain exceptions and provisoes. Section 11 provides:—"Where any land is acquired, either under the Defence Act, 1842, and the Acts amending the same, or for military purposes under any Act with which the Lands Clauses Acts are incorporated, the person or authority acquiring the land may require that the compensation to be paid for the land be settled by arbitration and not by reference to a jury, and thereupon the provisions of the Lands Clauses Acts with reference to arbitration shall, if not already applicable, apply for the purpose of settling the compensation."

The Military Lands Act, 1892 (55 & 56 Vict. c. 43), repeals the Volunteer Act, 1863 (ss. 31–40); The Regulation of the Forces Act 1871 (section 17); The Artillery and Rifle Ranges Act, 1885 (the whole Act except s. 3); The Drill Ground Act, 1883 (the whole Act); The Barracks Act, 1890 (ss. 2 and 3); The Ranges Act, 1891 (the whole Act, except section 11), and practically consolidates and amends the provisions of these Acts so repealed in regard to the acquisition of land for the military purposes of any portion of Her Majesty's forces, including volunteer corps. Section 2 enacts, that "for the purpose of the purchase of land under this Act, the Lands Clauses Acts shall be incorporated with this Act, subject to certain provisoes, including one 'that the provisions of the incorporated Acts with respect to the purchase of land compulsorily shall not be put in force until a Provisional Order has been made, and the sanction of Parliament has been obtained.'" Section 20 provides that "where any land is acquired under this Act or for military purposes under any Act with which the Lands Clauses Acts are incorporated, the person or authority acquiring the same may require that the compensation to be paid for the lands be settled by arbitration and not by reference to a jury, and thereupon the provisions of the Lands Clauses Acts with reference to arbitration shall, if not already applicable, apply for the purpose

of settling the compensation." Section 22 provides that all powers given by this Act shall be in addition to any other power to acquire lands for military purposes conferred by any Act passed before this Act, and nothing contained in this Act shall prejudicially affect the powers vested in the Secretary of State for War under the Defence Acts and the Acts incorporated therewith. Section 26 provides that "in the application of this Act to Ireland . . . an arbitration under this Act shall be carried out in accordance with the provisions of the Lands Clauses Acts."

R. E. Meredith, Q.C. (*Wakely* with him), for the applicant:—

In acquiring lands for military purposes or defence, the Secretary of State for War may proceed under the Defence Act, 1842, adopting the machinery which that Act provides; he may also proceed under the provisions of 23 & 24 Vict. c. 106, and have recourse to and use "all or any of the provisions of" the Lands Clauses Act of 1845; he may, thirdly, adopt the procedure under the Military Lands Act, 1892, in which case an inquiry and a Provisional Order sanctioned by Parliament are required. In any of these cases he may, under section 11 of the Ranges Act, 1891, and the corresponding section of the Military Lands Act, 1892, require the compensation to be assessed by arbitration instead of by reference to a jury, "and thereupon the provisions of the Lands Clauses Acts with reference to arbitration shall, if not already applicable, apply for the purpose of settling the compensation."

If the Secretary for War had proceeded in the present matter under the Act of 1842 alone, it might, perhaps, be open to argument that "compensation for the absolute purchase" meant merely the value of the lands actually taken; but we submit that even under the Act of 1842, these words are large enough to include a consideration of loss by severance and consequential injury to adjoining lands not taken. In *Re Laws* (1) it was held that the Act of 1842 made no provision for the landowner's costs or expenses incident to the ascertainment of the sufficiency of the compensation; but Pollock, C.B., expressed the view that compensation in this Act

(1) 1 Exch. 441.

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did include injury by severance. "Compensation" is nowhere defined, but means, we submit, satisfaction for the compulsory taking of the lands, including everything which a jury might reasonably consider; it is the equivalent for the price which the vendor would ask under the circumstances from a private purchaser, and must be affected by the knowledge in the vendor's mind that the sale of a part may, or certainly must, injure his remaining lands, by severance, or by reason of the intended user, as for instance where the lands were taken for such a purpose as the present, or, under other Acts, for a hospital or asylum. The true test and measure of compensation is the owner's loss by the compulsory taking, not the gain to the purchaser: see Cripps on Compensation, Ed. 1892, p. 114; *Stebbing* v. *Metropolitan Board of Works* (1); *Ricket* v. *Metropolitan Railway Co.* (2). "Compensation" in the Act of 1842 is the same, and the true measure the same, as in the Act of 1845, where the more specific definition, as including a consideration of these matters, does not extend, but explains merely, the meaning of the term, and may be used to interpret the term as employed in the earlier Act. The depreciation in value by severance in such a case as the present is considerable, for where half of a shooting, worth, say, £5000 is taken, the part remaining in the owner's hands is not worth £2500; and where, as here, the lands are taken for a rifle-range, a great part of the lands not taken will be valueless because of the user of such range. The argument for the War Department would result in allowing private rights to be taken away, or rendered valueless, for the public benefit, without fair compensation. The benefit is public, and the State, not the individual, should bear the burden.

But, whatever be the true view of the measure of compensation under the Act of 1842, taken by itself, the Secretary for War has not here proceeded under that Act; and, moreover, he has definitely elected, as he had power to do, to proceed under the Lands Clauses Acts, and sect. 11 of the Ranges Act, 1891. The notice of 13th November, 1894, does not mention the former Acts, for the applicant might have accepted the offer contained in it; but the notice of the 4th March, 1895, is further entitled in the matter

(1) L. R. 6 Q. B. 37, 43. (2) 34 L. J. Q. B. 257.

of the Lands Clauses Acts: see definition in the Interpretation Act, 1889; and the appointment of the arbitrator, and the duty assigned to him by the warrant of the Commissioners of Works, are made and prescribed under the Lands Clauses Acts, as amended for Ireland by the Railways Acts, Ireland. Under the Railways Act, 1851, as under the Act of 1845, the applicant would be entitled to claim, not only compensation for the value of the lands actually taken, but also (*a*) for damage to his adjoining lands by severance; (*b*) for consequential injury to—"injuriously affecting"—his adjoining lands not taken; and (*c*) accommodation works. Section 63 of the Act of 1845 in itself carries with it the right to compensation under the first and second headings: see *Reg.* v. *St. Luke's* (1), affirming *Ferrar* v. *London Commissioners of Sewers* (2); *Broadbent* v. *Imperial Gas Co.* (3). Upon the third heading we do not, in the face of the arbitrator's finding of fact that no case had been made out in the evidence, press for a direction in the writ which we are seeking; but, in regard to the first and second, we submit that the order for a *mandamus* should be made absolute. As a matter of fact the notice of the 4th March, 1895, is framed on a proposed separate consideration of purchase money, severance, and consequential injury. The compensation payable to some of the applicant's tenantry has been settled by agreement on this basis. The decisions in *Cowper Essex* v. *Acton Local Board* (4); *Hammersmith Railway Co.* v. *Brand* (5); and *Buccleuch* v. *Metropolitan Board of Works* (6), show that injury from the intended user is properly a subject for compensation under the head of consequential injury or "injuriously affecting": see also Cripps on Compensation (Ed. 1892), p. 162. The War Department suggest that the lands taken need not necessarily be used as a rifle range at all; but, apart from the fact that they have already been so used during the past year, the War Department were bound to disclose the purpose for which the lands were taken, and have, in their notices, formally and distinctly avowed their intention, and cannot now disclaim it.

[GIBSON, J.: The difficulty arises which was mentioned by the

(1) L. R. 7 Q. B. 148.
(2) L. R. 4 Ex. 1, 227.
(3) 7 De G. M. & G. 436.
(4) 14 App. Cas. 153.
(5) L. R. 4 H. L. 171.
(6) L. R. 5 H. L. 418.

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Court on the motion for the conditional order, that the arbitrator does not seem to have declined jurisdiction at all. We cannot order him to do something which he was ready to do and was not asked to do: *Reg.* (*Marshall*) v. *Justices of Tyrone* (1).] The meaning of what occurred before the arbitrator, and the understanding between all the parties was that the arbitrator did not go into the facts, and formally declined jurisdiction, so as to enable the questions of law to be raised in this way. [O'BRIEN, J.: Is there not another remedy open, by traverse?] That is, at least, doubtful, having regard to section 11 of the Ranges Act, 1891. If the contention of the Secretary for War be right, that these lands are being taken under the Act of 1842, and that it is the machinery for arbitration only that is adopted from the Act of 1851, then there would be no traverse, and *mandamus* would be the only remedy. This would follow from a decision adverse to the applicant on section 11. It would be different if the applicant's contention is right, that section 11 introduces all the provisions of the Land Clauses Acts, including traverse at assizes under the Railway Acts. Apart from this, there is the question whether traverse lies except in respect of some item on which the arbitrator has adjudicated. If a traverse lies, however, the form of the oath of the jury shows that they have power to take all these several matters into consideration. *Reg.* v. *Rynd* (2) is a direct authority that *mandamus* will be issued against the arbitrator where he has refused to take cognizance of matters (there the interruption of the right to access to the sea) in regard to which he should have given compensation: see also *Reg.* (*Norcott*) v. *Justices of Cork* (3). [*The Attorney-General:* The question was discussed also in *Reg.* v. *County Clare Grand Jury* (4), and *Reg.* v. *County Dublin Grand Jury* (*The Blessington Tramway Case*) (5).] Even assuming a traverse to exist, which the War Department will not admit, the arbitrator's duty was to assess compensation for the several heads of damage; he has refused, and the present proceeding by *mandamus* is certainly the more convenient remedy. It is not the existence of another remedy that is a bar to *mandamus*, but the existence of a

(1) 32 L. R. Ir. 201, 205.
(2) 16 Ir. C. L. R. 29.
(3) 28 L. R. Ir. 196.
(4) [1894] 2 Ir. R. 691.
(5) 32 L. R. Ir. 644.

more convenient one: see Shortt on Mandamus (Ed. 1890), p. 24, and *Re Barlow* (1). Under the circumstances it lies rather on the War Department than on the applicant to admit or deny the existence of a remedy by traverse.

The Secretary for War has definitively made his election of the course, one of several equally open to him, which he would pursue; and it was not competent for his counsel to object before the arbitrator that his award must be limited to compensation "for the absolute purchase" of the lands, without regard to the other matters. The application of section 63 (1845), and of the Act of 1851, would be meaningless, unless to enlarge (if that was necessary) the arbitrator's jurisdiction. Besides, the course which the Secretary originally chose was, we submit, the correct one; and, further, though it was optional, under the Act of 1860, to adopt the Lands Clauses Acts in whole or in part, the case admitted of no option at all where he also applied the power conferred by sect. 11 of the Ranges Act, 1891, for arbitration instead of a jury; but it was compulsory on him to follow the provisions for compensation contained in those Acts. Where the War Department proceed under the Military Lands Act, 1892 (which procedure has been adopted in, at least, two instances), the compensation must be assessed under the Acts of 1845 and 1851, and thus, unless our contention be correct, there would be different measures of compensation where the Secretary of State proceeded under the Act of 1892, and where he proceeded under the similar powers contained in the Acts of 1860 and 1891.

The Attorney-General (*the Right Hon. J. Atkinson, Q.C.*), and *M. J. Bourke, Q.C.* (*Vesey Fitzgerald* with them), for the Secretary for War:—

It was the understanding between the counsel repesenting the War Department and the applicant before the arbitrator that these questions should be raised in this way, andwe cannot, therefore, object to the proceeding by *mandamus*. The measure of compensation in this case is governed by the Act of 1842, which does not include anything but a consideration of the price of the lands

(1) 30 L. J. Q. B. 271.

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actually taken, "compensation for the absolute purchase of the lands." The Act of 1891, like the Act of 1860, allows the Secretary for War to apply the *machinery* of the Lands Clauses Acts in ascertaining the compensation to be paid, but leaves the subject-matter and the measure of compensation the same as it was before under the Act of 1842.

The Secretary for War has used the machinery provided by the Acts of 1845 and 1851, and Mr. Abbott has been appointed under these Acts; for that reason the notices and the warrant of appointment are in their present forms. The Commissioners of Works could use no other forms, and the service of notice in such form is necessary to the arbitrator's jurisdiction; but all the documents mention the Act of 1842 also: the land was surveyed and was taken under that Act; and the Secretary for War went into possession under that Act, under the warrant of two deputy lieutenants of the county (see sections 19 and 23).

The measure of compensation under the Act of 1842, and under the Lands Clauses Acts is entirely different, and the policy of these Acts different. The former enables lands to be taken for the defence of the realm. The latter merely group together a number of clauses which were generally introduced in local and private Acts; private undertakings of such public benefit that compulsory statutory powers were given to their promoters. For that reason these Acts were constructed in very general terms, giving compensation to everyone injuriously affected by their operation, railways and other undertakings so authorised being looked on as a sort of legalized nuisance. *Prima facie* these Acts gave a right to compensation to everyone affected by the undertaking, whether their land was taken or not; and it was not by these Acts, but by the changing current of judicial decision that the right of compensation so conferred was narrowed down to its present limits. See *Caledonian Railway Co.* v. *Ogilvy* (1); *Caledonian Railway Co.* v. *Walker's Trustees* (2); *Re Penny* (3); *Hammersmith Railway Co.* v. *Brand* (4); *Glasgow Railway Co.* v. *Hunter* (5); *Ricket* v. *Metropolitan Railway Co.* (6);

(1) 2 Macq. 229.
(2) 7 App. Cas. 259.
(3) 7 E. & B. 660.
(4) L. R. 4 H. L. 171.
(5) L. R. 2 H. L. Sc. 78.
(6) L. R. 2 H. L. 175.

Duke of Buccleuch v. *Metropolitan Board of Works* (1); *London, Brighton, and South Coast Railway Co.* v. *Truman* (2); *Cowper Essex* v. *Acton Local Board* (3); *Attorney-General* v. *Metropolitan Railway Co.* (4). As the law now stands, only an owner, whose land, or part of whose land is taken, can claim compensation; and compensation for injuriously affecting such owner's remaining lands not taken will only be given where the damage arises immediately from the construction of the railway or other undertaking—"from the execution of the works," not from the working or future user of the land.

[GIBSON, J.: Do you say that there is no traverse on either side? Is not the Act of 1864, which gives a traverse to the Company, expressly included?] Yes; but the existence of a traverse involves the question now at argument. We submit that the Secretary for War is proceeding under the Act of 1842, and that the Acts of 1845 and 1851, and the amending Acts, are made applicable only for the purpose of ascertaining the compensation to be paid under the Act of 1842, and do not enlarge the area of compensation in any way. Under the Act of 1842 the compensation to be paid is for the purchase of the land taken and for that alone. No other claim can be made. This is shown by *Re Laws* (5). As to severance, compensation for severance is not within the Act of 1842; but in any event, there is in this case no damage as a matter of fact resulting from severance; and even assuming that compensation could be given, as under the Lands Clauses Acts for "injuriously affecting" the owner's lands not taken, the alleged damage in this case would not come within that head. This is not the case of private undertakers negligently carrying out or not acting in accordance with their statutory powers; and even they, if acting without negligence in carrying out such powers, would be free from liability: *Geddis* v. *Proprietors of the Bann Reservoir* (6). The injurious effect, under the Lands Clauses Acts, must be by the *execution of the works* authorised

(1) L. R. 3 Ex. 306, 329; L. R. 5 Ex. 221; L. R. 5 H. L. 418.
(2) 11 App. Cas. 45.
(3) 14 App. Cas. 153.
(4) [1894] 1 Q. B. 384.
(5) 1 Exch. 441.
(6) 3 App. Cas. 430.

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by those Acts and the special Act, not by reason of the future legitimate user of the land. In *Cowper Essex* v. *Acton Local Board* (1) and in *Buccleuch's Case* (2) the injury arose immediately from the erection of the works. Here no works are erected at all; the rifle butts can hardly be called works, and in themselves can have no injurious effect on anyone. Besides, the lands now taken need not necessarily be used for a rifle range at all, that matter resting solely in the discretion of the Secretary for War, who is entitled to use the lands so taken for the defence of the realm in what manner he thinks proper, without interference by anyone: see *Hawley* v. *Steele* (3).

Here, however, as we submit, the Lands Clauses Acts are only applicable as applying a speedier machinery for the assessment of compensation under the Act of 1842, and in that Act, which is governed by a different policy and concerned with a different subject-matter, the word "compensation" cannot be explained by the use in the Lands Clauses Acts of the same term.

[Counsel also referred, in addition to the statutes above mentioned, to 2 Geo. 1, c. 12; 29 Geo. 2, c. 10, section 2; 44 Geo. 3, c. 95; and to *Rex* v. *Gardner* (4) (compensation under a Railway Act, 4 & 5 Wm. 4, c. xxv.).]

Cur. adv. vult.

1896. Jan. 20.

SIR P. O'BRIEN, L.C.J.:—

This is a case of great importance, for I must assume that pieces of land will again and again be taken by the War Office for military purposes; and it is essential that the procedure to be followed should be clearly ascertained. I have considered the case, therefore, with the best care that I could give to it, and have come to the conclusion that the procedure which has here been adopted is altogether wrong; that the matter was *coram non judice*, the arbitrator having no authority properly vested in him, as the proceeding was not within the Railways Act (Ireland), 1851

(1) 14 App. Cas. 153.
(2) L. R. 3 Ex. 306.
(3) 6 Ch. D. 521.
(4) 6 A. & E. 112.

(14 & 15 Vict. c. 70), this statute not being, in my opinion, incorporated with those under which the lands in question have been compulsorily acquired, and that, accordingly, the arbitrator was possessed of no authority which might become the subject of a writ of *mandamus*. Now, those representing the Crown on the present motion have acted with great caution throughout; and I cannot but say that the attitude adopted by the Attorney-General, and those with him, has been characterised by great prudence. Is there a traverse in the present case or not? The learned Attorney-General, though it would have, in one respect, materially assisted his argument, did not contend that the right to a traverse existed; and in this, I think that, from his point of view, and in the interests of the War Office, he acted very wisely. We all know that, in the case of railway companies, juries have been found to be extremely liberal; and, no doubt, in the case of the War Office, their liberality would tend even towards extravagance. Thus, it was manifestly in the interest of the War Office, and those who represented them—though I see how difficult their position was—that there should be no traverse before a jury. However, it is my opinion that the right to a traverse has been, once there has been arbitration, taken away altogether by the 11th section of the Act of 1891 (54 & 55 Vict. c. 54). That section is as follows:—

"(1). Where any land is acquired, either under the Defence Act, 1842, and the Acts amending the same, or for military purposes under any Act with which the Lands Clauses Acts are incorporated, the person or authority acquiring the land may require that the compensation to be paid for the land be settled by arbitration, and not by reference to a jury, and thereupon the provisions of the Lands Clauses Acts with reference to arbitration shall, if not already applicable, apply for the purpose of settling the compensation.

"(2). Section four of the Barracks Act, 1890, is hereby repealed."

What is the meaning of the section that I have just read? The Act is applicable to England as well as to Ireland. In England, it is quite plain that, if proceedings were being taken under this Act, there would be no jury at any stage of the case. Is it to be

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said that a section of a statute, which directly, by express words, excluded a jury altogether in England, at the same time indirectly, by the force of a definition in another Act of Parliament of the Lands Clauses Acts, made a jury in Ireland the practically uncontrolled masters of the situation. If it was felt convenient or beneficial to get rid of a jury in England, I should say that, *a fortiori*, this argument would apply to Ireland. The compensation is to be settled "by arbitration and not by reference to a jury." If a right to traverse exists, the words of the Act would not receive their natural and ordinary meaning, for we know that a jury, in the ultimate resort, would be complete masters of the position, and the award of the arbitrator, very likely, a mere waste of power. In fact, the result would, generally speaking, be the very opposite of what was enacted, for the compensation would be settled by a jury, and not by reference to an arbitrator.

But another result, equally unreasonable, would follow. We should not only have a totally different procedure, and different methods in England and in Ireland, but two totally different measures of redress. For, in England, no accommodation works could be granted at all; while, in this country, if the Railways Act, 1851, was held to be incorporated, accommodation works could be granted. The Interpretation Act (52 & 53 Vict. c. 63), on which this argument relies, says (section 23):—"In any Act passed after the commencement of this Act, unless the contrary intention appears, the expression, 'Lands Clauses Acts,' shall mean (*c*), as respects Ireland, . . . 'The Railways Act (Ireland), 1851,'" and certain other Acts there enumerated. Still this provision is expressly qualified so as not to apply to cases where an intention to the contrary appears.

I think that the manifest intention of Parliament was, that the procedure and mode of redress in both countries was to be the same; that, once there was arbitration, a jury was to be excluded; that it was therefore not intended that the Act of 1851 should be incorporated; that the Act, which it was intended should govern the procedure in these matters, was the Lands Clauses Act of 1845; and that, therefore, as the procedure thus prescribed was not followed in the case now before us, the arbitrator was acting without jurisdiction, and the proceedings were *coram non judice*.

But, on the other hand, if the Act of 1851 was incorporated, and was the Act which should here govern the proceedings—though I am of opinion that this is not so—there would, in that event, be a sufficient remedy open to the appellant by traverse, and its ancillary procedure, and therefore this Court should not grant a writ of *mandamus*, if, indeed, a writ of *mandamus* as to portion of a matter, and not the entire, would be granted at all. On this I offer no opinion.

There has been much controversy as to the question of the measure of compensation in such a case as the present. I do not think, having regard to the view that I have taken, that it is necessary to go into this matter. If, however, it were necessary for me to deal with it, I should be inclined to hold that Mr. Moore was entitled to compensation by reason of the rest of his land being injuriously affected. In regard to the question raised as to the necessity for the existence of works, as a condition precedent to the recovery of compensation for the use of the premises—I see no such limitation or condition in the decision in the case of *Cowper Essex* v. *Acton Local Board* (1); nor do I see any such condition in the Lands Clauses Acts. The matter to which I have been looking throughout is the question whether there could be two measures of compensation. If the War Department be right as to the construction of the Act of 1842, then there would be two measures of compensation—one if the lands were taken under the Act of 1842, and another if the lands be taken under the Act of 1892. For I take it that it is plain that under the latter Act the larger measure of redress claimed by Mr. Moore could be given. The legislature never contemplated that there should be two measures of compensation—that, in fact, the acquiring authority should have the option of depriving, by means of selecting one procedure, the owner of the lands of the fuller measure of compensation which he would be entitled to if another procedure had been adopted. I think that there is but one measure of compensation, and that the meaning of the expression, "compensation for the purchase of said lands," in the Act of 1842, means compensation for turning it into a rifle range, with all the injurious consequences resulting from its being turned to such a use. It has been

(1) 14 App. Cas. 153.

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argued that they may use the land for any purpose; and that, as it may not be used for a rifle range, the suggested injury may not arise, but I think that we cannot shut our eyes to the declared purpose of turning the land into a rifle range. Upon this question as to the measure of compensation, however, I express myself with doubt, but on the other grounds I have mentioned, I think the application should be refused.

O'BRIEN, J.:—

The Secretary of War, with a view to obtaining a site for a rifle range and camp, caused a notice to be served on Mr. Moore, an owner of property, entitled, "In the matter of an intended rifle range and camp, and in the matter of the Defence Acts, 1842 to 1873, The Ordnance Board Transfer Act, 1855, The Rifle Ranges Act, 1891," and served a further notice entitled in "The Lands Clauses Consolidation Acts" also. By the first notice he offered a sum of £5085, distributed under the separate heads of purchase value of property, and severance, and consequential injury. The notice also contained a column for accommodation works, which was in blank. The second notice was relied upon very much, both as determining the future use of the land, and as a definitive election by the purchaser to proceed under the Lands Clauses Acts for all purposes, instead of the Defence Acts, not merely as to the choice of the tribunal—that of an arbitrator instead of a jury—but also as to the measure or elements of compensation. It appeared, however, in fact, that instead of waiting for the amount of the compensation to be ascertained, and paying it, or lodging it in Court, as in a proceeding under the Lands Clauses Acts, the War Office authorities had already taken possession under the powers given by the Defence Act of 1842, so that must be construed to be an election, if extending to all the proceedings, which would have the effect of making the party electing a trespasser.

But supposing that the exercise of the election to proceed under the Lands Clauses Acts was still consistent and could be combined with the use of the powers under the Defence Act of 1842, to enter and take possession of the lands, two answers were given to this argument which it is necessary to notice in order to try and

clear the forest of questions as we go along. It was contended—first, that, by the express terms of sect. 11 of the Act of 1891, 54 & 55 Vict. c. 54, preserved in the Act of 1892, 55 & 56 Vict. c. 43, which now governs the whole subject of the acquisition of lands for military purposes, the Lands Clauses Acts are made to apply merely for the purpose of the machinery for settling the compensation by means of arbitration, and in that way are consistent with the Act of 1860, 23 & 24 Vict. c. 112, which says that the Secretary may use all or any of the powers and provisions of the Lands Clauses Acts, and therefore define or restrict its operation if more general. And, secondly, it was answered that it was not within the authority of the Secretary of War to waive or affect in any way the right of the Crown as to the principle or measure of compensation established by the Defence Act, and therefore that the option given to him must be taken to be subject to that Act as to the extent of the compensation to be awarded. It must further be observed that, while the Act of 1860, notwithstanding the clause that it was without prejudice to the rights under the Defence Act, would still appear to give the option of proceeding *ab initio* under the Lands Clauses Acts, so that even the possession might be acquired under that system, and not immediately under the Defence Act, yet in the later statute, under section 11 of the Act of 1891, the Lands Clauses Acts are applied only to the settlement of the compensation after the land has been acquired under the Defence Act; and I would say it is the necessary result of that Act, combined with the Act of 1892, that the option under the Act of 1860, if it any longer exists, could not now be applied as a means of obtaining possession of the land itself, and that that part of the proceeding must always remain under the Defence Act, at least in the absence of a Provisional Order having the effect of an Act of Parliament.

The owner having declined to accept the offer, which, if large, was not a fanciful one, but measured upon a usual scale of so many years' purchase of rents actually paid, the War Office authorities applied to the Commissioners of Public Works to appoint an arbitrator, which is the course of proceeding appropriate to the Railways Act of 1851. They appointed Mr. Abbott, who usually acts under that statute and under the Local Government Act of

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1871; and upon the arbitration, the arbitrator found that there was nothing payable for severance, which was a decision on a matter of fact that, it is conceded, he had a right to make; and, according to the account given in his affidavit, to which however I do not know of any principle of law that assigns the conclusiveness of the judicial report upon a trial, which is not evidence that allows of the sanction of an oath, but is a judicial act to which the law attributes such confidence as to exclude contradiction, he was willing to decide the matter, but the owner's advisers objected on the somewhat singular ground that if the decision were adverse to them they would be prejudiced. That is certainly not a very intelligible reason. The tribunal was willing to give them a chance of a decision in their favour; and, if they did not take their chance, they could not say the case was not decided, so as to throw upon the tribunal the responsibility for another proceeding. The arbitrator, against whom it is sought to use the coercive power of the Court, may say that he holds a position unaffected by the acquiescence of the parties, and ought not to be compelled to do what he was willing to do already. The matter, however, is capable of assuming easily a double aspect, consistent with the statement of Mr. Abbott and the affidavit of the owner. The arbitrator, no doubt, was willing to execute his function entirely, and, in the plenary confidence of a lay lawyer, considered himself equal to any legal difficulty; but this was not the view of the parties, and was passed over simply from courtesy without open dissent. And, in the argument, the learned Attorney-General obviously refused to be forced by technical difficulties into the violation of what was, admittedly, a common understanding. Of course it was common nonsense, and mere waste of time, to submit to an unprofessional officer a legal question of the extent and complexity of that which we have heard discussed. Still if the result were to alter the character of the *forum* from a traverse to a *mandamus*, and yet more, to take away the *forum* altogether, as would be the case if there could be no traverse of the award, the objection assumes grave importance, which would be merely postponed, not lessened, if the arbitrator directly refused to make a decision on the final award. In the throng of arguments on the subject, we must, to use a metaphor

from the occasion, try to find the single line that goes straight to the mark, without heeding the scattered shots of argument like those that killed Mr. Moore's sheep. There are two questions, one of right, and one of procedure. The first is whether, by reason of the special statute, the Defence Act of 1842, assuming he was acting under that statute, or in virtue of any other authority under which he could be considered to be acting, the arbitrator had a right at all to award compensation for lands injuriously affected. The other is whether a *mandamus*, as distinguished from a traverse, lies at all, which question again sub-divides itself into two others—namely, whether the remedy by way of traverse exists and is the proper one under the circumstances, and whether it lies for a matter which the arbitrator has refused to take into account at all, as distinguished from that on which he has affirmatively decided, leaving out the point already adverted to, that according to his own statement he did not refuse in fact to make a decision.

With respect to the right of traverse, it is certainly a point of very great difficulty, assuming that the proceeding was properly taken under the Railways Act of 1851, under which alone a single arbitrator was entitled to act. The law affecting it appears to stand in this way. Under the Defence Act of 1842, if the owner declined to accept the amount of compensation offered, the matter was to be settled by a jury, with an appeal to the Court of Exchequer, then the tribunal for all matters affecting the fiscal relations of the Crown. Section 4 of the Barracks Act of 1890 (53 & 54 Vict. c. 25), which is repealed by sub-section (2) of section 11 of the Ranges Act of 1891, first recognised the inconvenience of the tribunal under the Act of 1842, by allowing the compensation, with the consent of the parties, to be settled by arbitration instead of by reference to a jury, and providing that in that case the provisions of the Lands Clauses Acts should apply. The futility of such a provision requiring consent was quickly perceived, for in the succeeding year the Ranges Act, in section 11, which alone of that Act remains unrepealed, enacted that, where any land is acquired, either under the Defence Act of 1842 and the Acts amending the same, or for military purposes under any Act with which the Lands Clauses Acts are incorporated, the person or authority

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acquiring the land may require that the compensation to be paid for the land be settled by arbitration, and not by reference to a jury, and thereupon the provisions of the Lands Clauses Acts with reference to arbitration shall, if not already applicable, apply for the purpose of settling the compensation. This is a wholly distinct and substantive provision, and, except that under the Defence Act, the only one now in force, displacing any other inconsistent with it, for the machinery in cases of compensation, and is absolutely conclusive against the existence of the traverse, because it could not be intended to restore, through the means of arbitration after the award, the reference to a jury in the first instance which it was the object of section 11 to avoid; but it is the provisions of the Lands Clauses Acts in reference to arbitration that are alone to apply, and the Lands Clauses Acts have no provision for a traverse. It is therefore difficult to see in what way the provisions of the Irish Acts relative to a traverse of the award could be brought into the case. Supposing that there was no traverse, and that we were to read the 11th section of the Act of 1891, substituted for and comprehending section 4 of the Barracks Act, as confined to the part of the proceeding that was strictly the arbitration, and as having the effect of detaching from it the traverse that is expressly annexed to it in the Act of 1851—then the difficulty of another remedy existing, as an objection to a *mandamus*, would be removed out of the way of the owner, but not so as necessarily to lead to the result that *mandamus* would take its place as a remedy for an erroneous principle of assessment in the mind of the arbitrator. In the ordinary case of arbitration, the arbitrator is the judge of the law as well as the facts, and it is not easy to see in what respect it is not the ordinary case, unless the statute under which he acts has laid down a rule or measure of compensation for his guidance. Therefore, if the Court were to grant a rule, on the ground of his having declined jurisdiction, it could only direct him to decide, but could not direct the basis of his decision, which would be to take away the authority of his office.

Many of the difficulties, however, which were raised in the discussion, some of which I have noticed, including the fundamental one of the right of appeal, are answered by the opinion I have formed,

in accordance with a view presented to me by Mr. Justice Gibson after the case was argued, which had been shut out by the questions discussed—that the whole proceeding in the arbitration was wrong, that there was no legal tribunal at all, that there could be no arbitration under the Railways Act of 1851, and that the whole thing was founded upon a mistaken application of the Interpretation Act of 1889, as supposed to have the effect of identifying for this purpose the Railways Act, Ireland, 1851, with the Lands Clauses Acts generally. This, I think, was an entire error. That statute says:—"In any Act passed after the commencement of this Act, unless the contrary intention appears, the expression 'Lands Clauses Acts' shall mean . . . as respects Ireland, the Lands Clauses Consolidation Act, 1845, the Lands Clauses Consolidation Amendment Act, 1860, the Railways Act (Ireland), 1851, the Railways Act (Ireland), 1860, the Railways Act (Ireland), 1864, and the Railways Traverse Act, and any Acts for the time in force amending the same." The Local Government (Ireland) Act, 1871 (34 & 35 Vict. c. 109), which makes provision for taking land for municipal purposes by means of provisional orders, contains a nearly similar provision:—"The term 'Lands Clauses Acts' shall mean and include 'The Lands Clauses Consolidation Act, 1845,' as the same is amended by 'The Railways Act (Ireland), 1851,' 'The Railways Act (Ireland), 1860,' 'The Railways Act (Ireland), 1864,' and 'The Railways Traverse Acts.'"

The first difficulty that would arise in construing the Act of 1889 so as to apply to such a case as a rifle range would be to determine on what ground a preference could be given to the Railways Act above the Lands Clauses Act of 1845, both of which are mentioned in the clause and have a wholly different machinery. "The contrary intention," which is expressed in the Act, appears by the fact that the later statute, the Railways Act, has nothing to do with anything but railways. Under the Railways Act there are accommodation works. No such thing is known to the Defence Acts. How could arbitration without reference to a jury be carried out under a system part of which is a jury? If the traverse is struck out, there is no appeal. Under the Lands Clauses Acts there is an appeal to the House of

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Lords. However, the strongest argument is that it could not be within the functions of an interpretation section to alter the whole character of the tribunal, original and appellate, and that the section merely arrays together the enactments relating to the purchase of lands, leaving them to be applied to the subjects to which they belong. The result of all these various enactments, as appears to me, if we are to lead the case not only into the wood, but out of the wood, is that the last Act, the Act of 1892, requiring a provisional order, is intended to meet the case of the purchase of land compulsorily by the Secretary of War as well as others for military purposes, and that in that case the requirements of section 23 of the Defence Act as to a certificate are dispensed with, that the power to apply the provisions of the Lands Clauses Acts, under section 7 of the Act of 1860, is confined to the Secretary of War, that he can still proceed under the Act of 1842, and settle the compensation by a jury, otherwise the subject is governed by section 11 of the Act of 1891, which gives power to have the compensation settled by arbitration under the provisions of the Lands Clauses Acts with reference to arbitration, if not already applicable, which would seem to refer to the Act of 1860, which of course means two arbitrators and an umpire chosen by the parties, and not an arbitrator appointed by public authority under the Railways Act. It is clear that the proceeding could in no case be supported as a private arbitration upon the assent of the parties, both because of the notice, and because the arbitrator was not chosen by the parties; and the section is inapplicable to the case of a private arbitrator.

From this view it follows that the Court cannot, in my opinion, order a *mandamus* in a proceeding that has no legal existence, to rectify a mistake against an officer who has no authority.

However, as another Court may take a different view, and hold that the machinery of the Railways Act was available, it is necessary to consider the other question, the question of right, namely, what is the proper measure and limit of compensation. For this purpose we have again to recur to the Act of 1842, and follow down the two parallel lines of legislation, one relating to lands taken for military purposes, and the other to lands

taken for other objects, each pursuing a course absolutely distinct to the present time, which could not be without evident design of some kind, in order to see, in the case of lands taken for such a purpose as a rifle range, whether lands injuriously affected can be brought within the right to compensation.

"Compensation" is the word used in the Act of 1842, whether for the absolute purchase or the temporary use, and is, no doubt, an appropriate term to express the result of ascertainment by a jury, as "price," or "purchase money" does that of contract. It would, perhaps, not be impossible to force within the terms of the Act money awarded by a jury for lands injuriously affected; but, considering that the jury are to ascertain the shares to be paid out of the purchase money to lessees and other persons interested, who may be lessees of or interested in the lands taken only, and not of the lands injuriously affected, it is certainly difficult to see how the clause could be worked out, so as to be applied to anything but the land taken itself; and, *prima facie*, the whole group of sections in the Act of 1842 relating to the disposition of the compensation, the distribution, the lodgment in Court, and the provision for successive interests, are applicable simply to the purchase money of the lands, and agree with the principle of the case cited during the argument (*In re Laws* (1)), where it was held that the expenses of the proceedings could not be made to follow the division of the money awarded.

The power of compulsory purchase was a thing too rare at the date of 1842, to throw any light on the meaning of compensation from the instances in which it existed. It is quite certain that the owner would have in his mind a measure of price, if treating out of Court, that would not leave out of account the damage to other lands, which the Lands Clauses Acts established could not be considered a mere matter of fancy or caprice; and it is an obvious argument that what would operate on the mind of the owner in reference to price, would, in case of disagreement, be supposed to be transferred into the minds of the jury in the

(1) 1 Exch. 441.

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assessment. The Lands Clauses Acts, moreover, do not, in terms, introduce the element of lands injuriously affected, as something extrinsical or substantive, but in saying "regard shall be had" to other lands of the owner injuriously affected, as if that were a thing inherent in the compensation. Mr. Meredith, in the difficulty he had to contend with, from the point of view of the regularity of the arbitration, in bringing in the Lands Clauses Acts, accordingly contended that the principle of compensation for other lands was really contained in the Act of 1842. However, if the Statute Law, at a very short interval of time—from 1842 to 1845—has used additional words, not found in the earlier Act, that would give rise to an argument that they must have additional meaning. A solution of the difference was suggested in the idea that the Defence Act and the Lands Clauses Acts start from different points of policy—that the former concerns the security of the realm, and the other merely objects of commercial or public utility or convenience. This was argued to be the true reason why the two systems have been maintained together, though constantly brought into use, long after the Statute of 1860, by which it is contended they were amalgamated. That statute—the 23 & 24 Vict. c. 106, s. 7—gave power to the Secretary of War to use all the powers and provisions of the Lands Clauses Acts, and for such purpose provided that he should be deemed to be the promoters of the undertaking; and all the powers and provisions of those Acts should, if used by the Secretary of War, be treated as if they were contained in the Act of 1842. The clause of the Act of 1860, saying, they should be treated as if contained in the Act of 1842, would have the effect of inserting them in a general statute applying to this country. A reason for the extension of the Lands Clauses Acts to the case by section 7 of the Act of 1860, was suggested in the fact that buildings could not be erected on lands taken under the Act of 1842. However, it is certain that the two systems were assumed to be worked together; for the proviso at the end of the section still required the condition as to the certificate before the entry, under the Act of 1842, to be observed, which was inconsistent with the provisions of the Lands Clauses Acts. This section was strongly relied upon, on behalf of the

owner, as bringing in the measure of compensation under the Lands Clauses Acts, so as to embrace lands injuriously affected; and the notice that was served was contended to be the exercise of the option by the Secretary of War, so as to admit that measure to be applied. On the other hand, the second proviso, which says, that nothing herein contained shall prejudice or affect the powers and authorities of the Secretary of War under the Act of 1842, was relied on, and it was contended that, if that Act lays down a definite measure of compensation, that must prevail. However, if "powers and authorities" in the proviso could be taken to comprehend the right to purchase lands on the conditions as to the compensation or purchase money prescribed, they are certainly more appropriate to refer to the peremptory power of immediate possession which the Crown possessed under the Defence Act; and that would explain the strict jealousy with which the Defence Act has been maintained down to the latest period—to the Act of 1892. But, on the other hand, if a different principle of compensation were to be maintained with equal vigilance, we should certainly expect, at one or other of the points where the two lines of statutes approach each other, and their powers are confounded, some express notice of such a distinction. And, if this different measure of compensation remained in the mind of the Legislature, it is extraordinary that it is nowhere expressed; and it may be that the true account of the words, "injuriously affected," in the 68th section of the Lands Clauses Act, is not that it is a new right, but that it is a legislative exposition of what was included in the word "compensation"—making the meaning of the term co-extensive with the reasons that would operate on the mind of the owner if he were selling the property himself. I have, therefore, come to the conclusion that the compensation ought to be held to be of the same kind and extent under the two Acts.

Not the least difficult question remains, and not the least important, for it involves principles of wide application—namely, whether the other lands of the owner in this case are "injuriously affected," within the meaning of the Statute. It is contended for the Secretary of War that they are not, because there are no works erected on the lands taken, and the damage apprehended must be from the use of the lands taken, which may vary from

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time to time. Undoubtedly, the case is new in several respects, because there are no permanent works to be executed on the lands—for, even if it were not a mere fiction to say that rifle butts, boards with a backing of earth, at the distance of the long range, a thousand yards, were works within any reasonable sense—they are not the works by which the injurious effect is transmitted to other lands; because, moreover, the use is an intermittent one, and may, in the exercise of the ordinary rights of ownership, on which the law ought not to lay restrictions, be given up altogether; and further, because the effect is not one of those usually affecting the value of property, but one affecting such property as game, and depending on the instincts of animals *feræ naturæ*. This last kind of injury is certainly made the subject of claim for the first time, though possibly it might have arisen in some, though a less, degree from the making of railways through land producing little else but game in this country. Moreover, I do not find that the actual existence of works, on which so much stress is laid in the discussion of *Cowper-Essex* v. *The Local Board of Acton* (1), is required anywhere by the words of the Statute. If the principle of that decision be that works must exist because they are the mode of evidencing the future use of the land that is expected to produce the injurious effect, and determining that finally, so as not to affect the right of property to turn the lands to other uses afterwards—I can understand the argument. But that would make the works merely the evidence of the intended use, and not the condition of the right, and would not exclude other evidence, as if the Statute had spoken of works, and attached the rights to their existence, whether as a condition, or as the only evidence that fixed the future use of the land, so as not to interfere with the right of the purchaser to change it. If the lands are taken by the State, which is assumed to have continuance, and the use is stated in the notice—that appears to be as absolute a mode of dedicating it to such use as by the execution of works, and the owner would have a right to say he ought not to be put off upon the possibilities of caprice that might turn the place into a lawn tennis ground.

(1) 14 App. Cas. 153.

On the other hand, though there are no works—though the instance be new, in the fact that the use will be occasional, and the injury to such a thing as game, and depending on natural habits—yet, if the instance be one that is inclosed within the principle of injuriously affecting lands, only requiring to be drawn out by the occasion, and if the injury be not fanciful or imaginary, I cannot see upon what legal ground we could arrest the application of the principle to the present case, so as to deprive Mr. Moore of the right to have the damage-question taken into account in the compensation. If the proceeding were right, and it was the case of a public arbitrator, I would, perhaps consider that a *mandamus* was not an improper remedy, even though there was a traverse.

GIBSON, J. :—

The only question argued in this case was whether the applicant was entitled to claim compensation for damage done to his shooting in consequence of part of his estate being taken by the War Department for the purpose of a rifle-range ; and whether he was entitled to enforce his right by *mandamus*. A decision either way is attended with considerable difficulty. I shall first consider whether the case comes within the Lands Clauses Consolidation Act, 1845 ; as, if it does not, the motion, admittedly, must be refused. I will then take up the Defence Act and the effect of subsequent legislation ; and, lastly, I shall deal with the question of the arbitrator's jurisdiction and *mandamus*.

"Where part of a proprietor's land is taken from him, and the future use of the part so taken may damage the remainder of the proprietor's land, then such damage may be an injurious affecting of the proprietor's other lands, though it would not be an injurious affecting of the lands of neighbouring proprietors from whom nothing had been taken for the purpose of the intended works" : *Cowper Essex* v. *Local Board of Acton* (1). The best explanation of this distinction that I am aware of is to be found in the judgment of Montague Smith, Willes, and Brett, JJ. (2). An owner of the former class had a *locus standi* to oppose the bill before Par-

(1) 14 App. Cas. 161.
(2) *Buccleuch's Case*, L. R. 5 Ex. at p. 255.

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liament; if the bill became an Act, he was entitled to compensation for the injury to his rights from the exercise of the statutory powers, inasmuch as but for the statute such injury would have been an actionable wrong. As compensation, over and above the mere value or loss from severance, is given, it must be intended that such compensation should be assessed with some reference to the purpose for which the land is taken. If a field beside a handsome mansion were to be taken for a smallpox hospital or sewage-farm, the injury to the residence would be very different from what it would be if the field were only required as an ornamental public park or garden. On the other hand, an owner, none of whose land was taken, had no *locus standi* in Parliament; he could only sue or recover compensation where there was a physical interference with some right appertaining to and increasing the value of his property. The last authority on this subject is *In re London, Tilbury, and Southend Railway Co.* (1), where the *Cowper Essex Case* (2) was extended to a case where no land was taken, but ancient lights were affected; and it was laid down that, under the Railways Act, the moment the case was brought within the compensation clauses, full compensation for all damage must be given. In that case damages were assessed in respect of windows for which no right to light had been acquired.

In the present case, the Attorney-General disputes the application of the *Cowper Essex Case* (2) on two grounds: first, there are no works to be executed; secondly, the land taken may be used for any military purpose, and not necessarily for a rifle-range. As to the first point, no such condition is stated in the passage quoted from Lord Halsbury's judgment; nor is it clear why, if the land is taken for a use that must injure the rest of the property, the mere absence of physical works should take away the owner's right to compensation. The use of ground as a rifle-range next a private villa might be an intolerable nuisance, and destroy its value as a residence. Take another illustration. Part of a proprietor's estate is acquired under statutory powers for a smallpox hospital. Part of a neighbour's estate is taken for exercise and recreation of the hospital patients during convalescence, but no

(1) 24 Q. B. D. 326 (2) 14 App. Cas. 153.

works are required on such land. The same injury may be inflicted on both estates. Can it be that though the first owner may obtain compensation, the latter cannot, because no works are to be constructed on the part taken? It is the acquisition and user of the lands under the statutory powers that, under section 63, give rise to compensation. I doubt, however, that the supposed distinction at all exists in fact. Butts and other structures would probably be wanted. The damage resulting from the use of the rifle-range with such structures ought to support compensation quite as much as the damage from use of the road in *The Duke of Buccleuch's Case* (1).

The other distinction is also unfounded. The land is taken for the declared purpose of being used as a range. If it was taken under section 23 of the Act of 1892, compensation clearly could be given on the ground of intended user. Possibly, when the land is once acquired, it might be used for other military purposes; but the same remark might apply to land acquired by private promoters whose undertaking might embrace different objects, some offensive, and some not. But such promoters would be bound, in assessing compensation, by the use for which they professed to be acquiring and exercising statutory powers.

I next turn to the construction of the Defence Act of 1842. Does it give the same measure of compensation as the Act of 1845? It is no doubt startling if the proprietor of land taken under this Act should not possess the same rights. Why should a proprietor, whose ancient lights were destroyed by the erection of new barracks in a garrison town, under 22 Vict. c. 12, sect. 4, or whose mill was deprived of water by the destruction of an ancient weir, be entitled, as the cases prove, to compensation for the resulting injury to his property under the Act of 1845, yet not entitled under the Act of 1842? No doubt the Defence Act is of national importance, and *salus populi, suprema lex*. But the safety of the State is best secured by a general average contribution, and not by making jettison of individual interests.

The language of the Act of 1842 is derived from earlier legislation, which deals with compensation in general terms of a

(1) L. R. 5 Ex. 221.

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concise character. Thus, 21 Geo. 3, c. 10, speaks of compensation to proprietors. The Act, 44 Geo. 3, c. 95, is substantially the same as the present Defence Act, which reproduces without change the short, comprehensive language of the earlier statute, notwithstanding that the distinction between value, severance, and consequential damage had been made in many Acts, particularly Railway Acts.

Though nothing is said in the Defence Acts about severance, I have no doubt that the compensation given must include depreciation from severance. Does it also include consequential injury? An ordinary willing vendor would take into consideration the depreciation resulting from the works on, and user of, the part taken; and one would think that the Legislature ought not to put an unwilling seller in a worse position: *Buccleuch's Case* (1), though of course no strong argument can be founded on this probability. Compensation is a wide term, and, if the words were "compensation in respect of the land taken," they might let in consequential damage. The language of section 19 is, however, somewhat different. In section 11 of the Ranges Act, 1891, the expression, "compensation to be paid for the land," must, in the case of lands taken under a statute incorporating the Lands Clauses Acts, and therefore authorizing full compensation, embrace value, severance, and consequential injury, as it is impossible that value and severance alone were to be left to arbitration, and that consequential injury was, as before, to be assessed by a jury. If all three heads of claim are covered by "compensation" in section 11, why should they not equally be included in the analogous language of the Statute of 1842? The point is one of difficulty, on which I would not entertain a very decided opinion if the Act stood by itself.

It is next argued on behalf of the applicant that, whatever might be the construction of the Act of 1842, standing alone, subsequent statutes interpret it in the larger sense, or that, if they have not that effect, they enable the War Department to use and apply all the clauses of the Act of 1845 relative to compulsory acquisition and compensation.

(1) L. R. 5 Ex. at p. 251.

The first of the statutes so relied on is 23 & 24 Vict. c. 106, sect. 7, which empowers the Secretary of State to use all or any of the powers and authorities by the Lands Clauses Consolidation Act, 1845, given to promoters of the undertaking as therein mentioned; the Secretary is to be deemed the promoters, and all the powers and provisions, if used, are to be treated as contained in the Defence Act. There is a *proviso* restricting the power of compulsory purchase by the conditions imposed by section 23 of the Defence Act, and declaring that section 7 is not to prejudice or affect the powers and authorities of the Secretary under the Act of 1842. The object of thus keeping intact the powers under the Act of 1842 was to enable lands to be taken, if necessity arose, without the delay incident to the Lands Clauses procedure. On the other hand, in certain cases, as where there were subjacent minerals, it would be desirable to acquire the soil under the Lands Clauses Acts, the Defence Acts being silent as to distinction between the land and the minerals underneath, a matter which, in England, would be of great importance.

Is the effect of this legislation only to enable the Lands Clauses machinery to be utilized if, and so far as, it is not inconsistent with the Act of 1842, or does it enable that procedure as a whole to be used as an alternative means for compulsory purchase? The *proviso* is in favour of the latter view. If all the powers can be used, this would include sections 18, 49, and 63. The use of the compulsory powers would draw with it the consequential provisions as to compensation: *Reg.* v. *St. Luke's* (1). So construed, section 7 favours the wide construction of "compensation" in the Act of 1842, as it is inconvenient that there should be two distinct measures of compensation, to be applied according as the Secretary elected to proceed under the Act of 1842 or the Act of 1845. This view is supported by statutes of the character of the Acts of 1890, 1891, and 1892, to be considered presently.

The next statute is the 23 & 24 Vict. c. 112. It is of limited application; but one section, the 46th, appears to me to amend the Defence Act generally. The 29th section gives a like discre-

(1) L. R. 7 Q. B. 148.

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tionary and one-sided option to use the powers and provisions of the Act of 1845. In neither of these Acts is there any reference to the Act of 1851. If therefore the War Department adopted the arbitration clauses of the Act of 1845, the procedure under the Act of 1851 would have been inapplicable.

Another class of statutes is exemplified by the Barracks Act of 1890, the Ranges Act, 1891, and the Military Lands Act, 1892, all of which enable land to be acquired compulsorily under the Lands Clauses Acts, subject to Parliamentary sanction. In statutes of this character compensation can certainly be assessed for consequential injury: *Reg.* v. *St. Luke's* (1). If, therefore, the Act of 1842 does not give such compensation, the anomaly arises that if the Secretary of State takes land for a rifle-range under the Act of 1892, sect. 23, he has to pay a compensation which is greater than if he acquired the lands under the Act of 1842. Why should the landowners' rights to compensation depend on the option of the acquiring authority?

Does the phrase, "Lands Clauses Acts," in legislation of this last class mean, in Ireland, the Railways Act, 1851, and amending statutes, or does it mean the Act of 1845 and statute of 1860? If in section 3 of the Act of 1891 it has the former meaning, then it follows that, as the whole of the Railways Act, 1851, is thereby incorporated, the entire compulsory arbitration procedure is introduced with consequent right of traverse, and the arbitrator can, in Ireland, award not only compensation, but also accommodation works, including fencing. Yet it is plain that Parliament, in sect. 11, never supposed that, in the case of military statutes incorporating the Lands Clauses Acts, there was, under the Act of 1851, an elaborate arbitration code of a compulsory character already applicable; nor did it intend that the compulsory arbitration, created by sect. 11, should deal with anything but money compensation. If the Act of 1851 is included as a Lands Clauses Act in sect. 11, then so far as relates to military statutes incorporating, under section 3, the Act of 1851, the section is redundant and useless; and, being redundant, it cannot affect the right to accommodation works resulting from the incorporation under section 3.

(1) L. R. 7 Q. B. 148.

The words, "if not already applicable," seem to fit rather arbitration under the Lands Clauses Acts proper than under the Act of 1851. Under the Act of 1860, the Secretary of State could, if he so desired, use the powers of the Act of 1845.

The object apparently, of section 11, was to take up the existing system of arbitration, which was the same in England and Ireland, under the Act of 1845, and enable it to be applied compulsorily at the option of the acquiring authority. There is no visible intention to disturb the previous uniformity of procedure. No accommodation works of course can be given under the Lands Clauses Act of 1845, and, under section 3, it would be *ultra vires* in England to award such works.

Is it possible that the measure of compensation differs in England and Ireland, and that such difference is contemplated and produced by the Interpretation Act? The Court, if it can, should struggle to avoid such an inconvenient and unjust result.

It is desirable to subject section 11 to a separate and careful examination, but it is, I think, impossible that "Lands Clauses Acts," in section 3 and in section 11, can have different meanings.

What is the effect of the Ranges Act, 1891, section 11? Previous to 1890, land could only be compulsorily acquired for military purposes under the Defence Acts, or under the Lands Clauses Act, where the procedure under that Act was adopted. The Railways Act (Ireland) 1851, referred to railways only, and did not apply to lands taken for military purposes. Compensation under the Defence Acts was assessed by a jury, and under the Lands Clauses Act by a jury or arbitration, or, where the sum was small, by justices. No accommodation works could be given under these Acts.

By section 4 of the Barracks Act, 1890, where land was acquired under the Defence Act, 1842, and the Acts amending the same, "the compensation to be paid for the land" might by agreement be settled by arbitration, instead of by reference to a jury, and thereupon the provisions of the Lands Clauses Acts became applicable as in case of an arbitration under those Acts. It will be observed that the section does not apply to land acquired under the Land Clauses Acts, under which arbitration, at the owner's option, already existed.

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This section was repealed by the Ranges Act, 1891, section 11, which preserved the words, "compensation to be paid for the land," but introduced some material changes. The arbitration procedure was made compulsory at the election of the acquiring authority, no similar option being given to the land-owner; the procedure was extended to lands taken for military purposes under any Act incorporating the Lands Clauses Acts; and these provisions of the Lands Clauses Acts as to arbitration were only introduced if not already applicable.

At the time these Acts were passed, in the case of lands taken under the Defence Acts, there was an appeal to the Exchequer; in the case of lands acquired under the Lands Clauses Acts, error in assessment by a jury could be remedied by the proceeding being removed into the Queen's Bench by *certiorari*: *e.g. Ricket's Case* (1); and error by arbitrators could be corrected, either by Case Stated as in *Rhodes' Case* (2), or, when the award was enforced by action, by the party who impeached the award putting forward defences, the nature of which is fully explained by Mr. Justice Blackburn in the *Buccleuch Case* (3). In these latter events the points of law could be brought to the House of Lords; but, on questions of fact and amount, the finding of jury and arbitrators was final. Identical rights of appeal and review were enjoyed by the English and Irish landowner.

Apart from the effect of the Interpretation Act, I think that section 11 of the Act of 1891 seems intended to establish a uniform arbitration procedure under the Lands Clauses Acts proper, substituting option by the acquiring authority for option by the owner. If the argument of counsel be correct, that the arbitration procedure under the Railways Act, 1851, is introduced, the effect of the Interpretation Act is to produce a complete divergence between the land-owner's rights in the two countries, and, by the option of the Secretary of State, to destroy in Ireland the previous right of review.

In England, the verdict of a jury (subject to such appeal and revision as above indicated) is replaced, if the Secretary of State so elects, by the award of arbitrators and umpire whose finding of

(1) L. R 2 H. L. 175. (2) 1 C. P. D. 402. (3) L. R. 5 Ex. 221.

fact is conclusive, but whose error in law can be corrected by the House of Lords.

In Ireland, the verdict of a jury (subject to the same right of appeal and revision) is *ex hypothesi*, by the like election, replaced by the award of a single arbitrator, who can state no case, whose award does not require to be enforced by action, and cannot therefore be impeached in defence, and whose award, if reviewable by traverse, is to be examined by a jury. The jury which the Legislature wished to get rid of, thus reappears as an appeal tribunal; so that, while in England the award is final on facts, but not in law, in Ireland the award may be reversed on the facts by a jury, and the only way of correcting error in law is by the inadequate machinery of a case stated, not subject to appeal. The absurdity of incorporating the traverse procedure, though an integral part of arbitration under the Act of 1851, is so great that counsel hardly argued that it could apply. If it does not, then there is no appeal at all; and, by a definition clause in a general statute, a pre-existing right of appeal is destroyed without any substitute being provided. This is startling, and it is all the more so, that this destruction of the land-owner's rights depends on the option of the acquiring authority. If no option is exercised the Irish land-owner enjoys the same rights as his English brother.

These difficulties have led me to consider the meaning of the words "Lands Clauses Acts" in the Act of 1891. Taken by themselves, they would not, on the historical context of the Legislation, mean the Act of 1851. The Interpretation Act, section 23, contains the material qualification, "unless the contrary intention appears." This contrary intention need not be shown by express language; it may be collected by reasonable inference from the Legislation as a whole.

On the one hand, it seems clear, that, in England, the expression "Lands Clauses Acts," in section 23, unless the contrary intention appears, means the Act of 1845 as amended by the subsequently specified statutes, which are all Lands Clauses Acts proper. It is also clear that, in Ireland, the expression, subject to the same qualification, means the Act of 1845, as amended by the Act of 1860, and the Railways Act of 1851, as amended by

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the subsequently specified statutes. Does, however, sect. 23, sub-section (*c*) mean that the Railways Act, which applies to railways only, should be treated as a general amendment of the Lands Clauses Act of 1845, so that all the compulsory clauses and machinery of the latter Act are to be regarded as displaced or repealed in cases falling within section 23? This would be the obvious construction; but, on the other hand, there is a good deal to be said for the view that sub-section (*c*) comprises a fasciculus of two independent sets of statutes, giving distinct and alternative powers, and that application of the powers under the Act of 1845, or under the Act of 1851, depends on the context of the particular incorporating statute. There is nothing contrary to principle in holding that compulsory purchase for railways or public health purposes should be under the Act of 1851, but that compulsory purchase for military purposes should be governed by the Act of 1845. The question depends partly on the construction of sub-section (*c*), and partly on the question whether in the Military Purposes and Defence Acts "a contrary intention appears." An example of the application of this principle of "contrary intention" is to be found in *Chorlton* v. *Lings* (1); and there are many cases in which an interpretation clause in a statute has been held inapplicable on a particular context.

The following points are worthy of consideration:—In the Local Government (Ireland) Act, 1871, the Artisans' Dwellings Act, 1875, and the Public Health Act, 1878, "Lands Clauses Acts," are defined to mean the Act of 1845, *as amended* by the Act of 1851. The only compulsory clauses of the Act of 1845 adopted by the Act of 1851 are sections 16 and 17, and these very sections are expressly excluded by the Acts of 1891 and 1892. In the amending Act of 1860, the Lands Clauses Act cannot by any possibility include the Act of 1851. If the Railways Act is one of the Lands Clauses Acts within section 3 of the Act of 1891, then, as it is adopted under that section as a whole, without qualification, in the Provisional Order Statute, it follows that in Ireland in such case accommodation works can be awarded, with consequent right of traverse, though there is no similar right to accommoda-

(1) L. R. 4 C. P. 374.

tion works in England. Counsel agreed that, in the present case, there could be no right to accommodation works under section 11.

Again, if the Railways Act is one of the Lands Clauses Acts within section 11, it would seem that, as already pointed out, in statutes incorporating the Lands Clauses Acts, arbitration under the Act of 1851 was already in existence, irrespective of any consent or option, so that in statutes of this class it was unnecessary, in Ireland at least, to make any specific provision for arbitration such as is created by section 11.

If the Secretary of State exercises no option under section 11, but acquires under the Land Clauses Acts of 1845 and 1860, the Act of 1851, applicable to railways, cannot be one of such Lands Clauses Acts, but there can be an arbitration under the Act of 1845. If, for the purpose of compulsory purchase, "Lands Clauses Acts" cannot in such case include the Railways Act, how can the option of arbitration introduce, as a new Lands Clauses Act, the statute of 1851, notwithstanding that there is sufficient arbitration machinery under the Act of 1845?

For the above reasons I doubt that the Act of 1851 applies to this case. If it does not, the arbitration here was held without jurisdiction.

If this doubt is unfounded, and the Act of 1851 applies, the Court ought to be astute to discover some substituted relief, whether by way of traverse, or by *certiorari* and *mandamus*. In England, notwithstanding that *certiorari* is prohibited by section 145 of the Act of 1845, it is frequently granted when compensation has been assessed on an illegal basis.

If the Act of 1851 applies, there is probably a right of traverse, which, under that Act, is an essential part of arbitration. In Provisional Order Statutes, under section 3 of the Act of 1891, it would be hard to exclude traverse procedure, if the Act of 1851 is included in "Lands Clauses Acts," which are, as a whole, thereby adopted.

If there is a right of traverse, there is not the same necessity for allowing *mandamus*, though such right may not, *per se*, be a bar. Supposing, however, that there is no traverse, the Court must have some power of correcting an arbitrator who declines to exercise his jurisdiction, or exceeds it.

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If the arbitrator will not exercise his jurisdiction to consider a claim for consequential injury, a proprietor, prejudiced by his refusal ought to be able to compel him to adjudicate by *mandamus*, if he has no other remedy: *Walker's Case* (1); *Reg.* v *Kennedy* (2); *Reg.* v. *King* (3). Similarly, if he award compensation in respect of a matter beyond his legal competence, the acquiring body ought to be able to correct him by *certiorari*. An award under the Lands Clauses Act, 1845, would unquestionably be vitiated, if the arbitrators declined to adjudicate upon a head of claim which it was their duty to decide, or if they gave compensation for a matter outside their statutory powers: *Buccleuch's Case* (4). I am not, however, aware of *mandamus* ever having been applied for under the Act of 1851 save in *Rynd's Case* (5), where the arbitrator altogether declined jurisdiction. Even if *mandamus* and *certiorari* exist under the Act of 1851 they have been so little used in this country that they can hardly be regarded as supplying, in the opinion of Parliament, a sufficient substitute for the rights supposed to be extinguished by section 11.

If the arbitrator had jurisdiction, I think that the Court would be bound to direct the *mandamus* in this case to issue in order to allow the questions of law to be raised in such a way that either party could take the case to the House of Lords. The points raised are of great importance, and ought not to be finally disposed of on motion to issue the writ.

On the substantial questions argued, I think the applicant is in the right, but my doubt as to the arbitrator's jurisdiction is such that I cannot direct a writ of *mandamus* to issue.

Order discharged without costs.

A. E. R. J.

(1) 3 Q. B. 744.
(2) [1893] 1 Q. B. 533.
(3) 20 Q. B. D. 436.
(4) L. R. 5 Ex. at p. 230.
(5) 6 Ir. C. L. R. 29; 17 Ir. C. L. R. 148.

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March 2.

The Principal Secretary of State appealed from the order made by the Queen's Bench Division.

Before the appeal came on for hearing, the arbitrator was requested, by the Principal Secretary of State, to make up his award, but refused so to do, in consequence of the decision of the Queen's Bench Division. The Principal Secretary of State thereupon applied to the Queen's Bench Division for a *mandamus* to compel the arbitrator to make up the award, but that Division refused the application. The Principal Secretary thereupon requested the Commissioners of Public Works to appoint another arbitrator in lieu of Mr. Abbott, and on this request being refused, applied to the Queen's Bench Division for a *mandamus* to the Commissioners of Public Works to appoint a new arbitrator. This application was also refused by the Queen's Bench Division. The Principal Secretary of State appealed also against these two last-mentioned orders of the Queen's Bench Division, and by leave of the Court of Appeal obtained by the appellant, the three several appeals came on for hearing together, before Lord Ashbourne, C., and Fitz Gibbon, Barry, and Walker, L.JJ.

The Attorney-General and *M. J. Bourke, Q.C.* (with them, *J. F. Vesey Fitz Gerald*), for the appellant:—

The arbitrator has been duly appointed. Since 1860, when the Railways (Ireland) Act, 1851, was made perpetual, no Public Act relating to Ireland has authorised compulsory purchase of land except under the Railways (Ireland) Act, 1851. Since the same date several Acts have been passed in which the phrase "Lands Clauses Acts" expressly, or by implication, includes the Railways (Ireland) Acts, 1851 and 1860:—*e.g.* 26 & 27 Vict. c. 88, ss. 26, 27; 34 & 35 Vict. c. 109, s. 3; 34 & 35 Vict. c. 68, s. 14; 37 & 38 Vict. c. 93, s. 66; 40 & 41 Vict. c. 49, s. 3; 41 & 42 Vict. c. 52, s. 2; 46 & 47 Vict. c. 36, s. 7; 47 Vict. c. 6, s. 2 (2); 48 & 49 Vict. c. 36, s. 7. This last-mentioned section is of great importance. It defines "Lands Clauses Acts" to be "as regards England and Ireland, the Lands Clauses Acts of 1845, and the Acts amending the same in England and Ireland, *respectively*." Next came the Interpretation Act, 1889, since which the expression, "Lands

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Clauses Acts," has been used to include the Act of 1851, in 53 & 54 Vict. c. 25, s. 2; 53 & 54 Vict. c. 70, s. 20; 55 & 56 Vict. c. 43, ss. 2 and 26 (3). This last section shows that the word "arbitration" is applied to proceedings under the Act of 1851, because it must be something different from English arbitration.

In sect. 10 of the Ranges Act, 1891, "Lands Clauses Acts" (by reference to 48 & 49 Vict. c. 36, as well as by the Interpretation Act, 1889), includes the Act of 1851, and, therefore, presumably in section 11 also. If the words, "and not by reference to a jury," in section 11 of the Ranges Act, 1891, are held to abolish all such reference, it must apply to section 23 of the Lands Clauses Act, 1845, and to section 35 of the Scotch Lands Clauses Act (8 Vict. c. 19), in which case there would be no means of settling compensation in case of an abortive arbitration under those Acts.

The same discrepancy arises under the Act of 1851, which abolishes reference to a jury, and yet gives a traverse.

THE COURT OF APPEAL intimated that they would consider the validity of the appointment of the arbitrator first, and if they held his appointment valid, the other question could be argued subsequently.

Meredith, Q.C., and *Wakely*, for the respondent.

Cur. adv. vult.

April 28.

WALKER, L.J., delivered the judgment of the Court as follows:—

In this case Her Majesty's Principal Secretary of State has required for military purposes, viz. a rifle-range, certain lands of Mr. Moore, and he has proceeded to acquire them under the Defence Acts; and on the 13th November, 1894, he served notice on Mr. Moore, entitled, "In the Matter of an intended Rifle Range and the Defence Acts," offering £5085 as the price, and informing him that, if he refused that sum, he would take such measures as might be necessary under the Defence Acts for obtaining immediate possession; and the notice then proceeded: "And also will require that the compensation to be paid for the said lands, &c. shall be settled by arbitration, pursuant to the 11th section of the 'Ranges Act, 1891,' and not by reference to

a jury. And the said Principal Secretary will take all necessary steps to have an arbitrator appointed pursuant to the statutory powers in that behalf, and to have the compensation to be paid by the said Principal Secretary for such lands &c. determined by such arbitrator pursuant to the same statutes."

The next steps were the lodgment and deposit by the War Department of maps and plans under the third section of the Railways (Ireland) Act, 1851, and the appointment by the Commissioners of Public Works of Mr. Abbott, as arbitrator, and the publication of a requisition for claims. Due notice of all those steps was given to Mr. Moore, and Mr. Abbott proceeded to inquire into the value of the land taken.

In the course of the inquiry a dispute arose as to whether evidence on a certain alleged head of damage, viz. an injurious affecting of other lands, could lawfully be received by the Government arbitrator, with the result that the landowner has sought to compel him by *mandamus* to receive that evidence. The Queen's Bench Division has refused to grant a *mandamus*, on the special ground that the arbitrator was not properly appointed, and that the proceedings were *coram non judice*. Other grounds were suggested for refusing it, but the one I have stated forms the basis of the judgments. If they are right in that, it is plain that a *mandamus* to Mr. Abbott would not lie; and this question of jurisdiction has been, by the desire of both parties, first argued before us as a preliminary question, and we have now to dispose of it. If we agree with the view of the Queen's Bench Division, it is unnecessary for us to express an opinion upon the legal admissibility of the evidence tendered.

The legislation governing the taking of lands by the State for defence for military purposes extends over nearly half a century; and for the right understanding of that legislation it is necessary to carefully examine the provisions of numerous statutes, beginning with the 5 & 6 Vict. c. 94, and ending with the "Military Lands Act, 1892."

Under the 5 & 6 Vict. c. 94, the principal officers "may enter on and mark out any lands, buildings, or other hereditaments or easements, wanted for the service of the Ordnance Department or for the defence of the realm, or stop or divert any public or

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private footpaths or bridle roads, and treat and agree with owners," and if, after notice in writing, there be refusal or inability to treat, the officers may enter and hold possession. The Act then contains provisions for the summoning of a jury, whose duty is to "find the compensation to be paid, either for the absolute purchase of such lands, buildings, or hereditaments, or for the possession or use thereof, as the case may be." A right or appeal is provided to the Court of Exchequer, which requires the intervention of another jury; and there is a proviso that it shall not be lawful to use lands compulsorily taken for barrack service or erect barracks thereon. There are also provisions as to title, where money compensation is assessed and no absolute interest exists.

The 17 & 18 Vict. c. 67, enacts that the Principal Officers may "use and avail themselves of all the powers and provisions" contained in the Lands Clauses Act, 1845, for ascertaining and paying compensation for, and extinguishing *rights of common* over lands, "the soil of which has been, or shall be purchased or taken under 5 & 6 Vict. c. 94"; and for the purpose of being so used all the powers and provisions of the Act of 1845 may, if necessary, be treated as contained in 5 & 6 Vict. c. 94.

By the 18 & 19 Vict. c. 117, the "Secretary of State" is substituted for "Principal Officers." Those powers received some extension by 22 Vict. c. 12, s. 1; but this section is repealed by the Act of 1892.

The Lands Clauses Amendment Act, 1860 (23 & 24 Vict. c. 106) provides, that for the purchase of any lands, &c. wanted for the service of the Admiralty or of the War Department, or defence of the realm, the Secretary of State may use all the powers, &c. of the Lands Clauses Act, 1845, as if contained in 5 & 6 Vict. c. 94; and those powers are declared to be cumulative.

The Defence Act, 1860, is primarily directed to the acquisition of dockyards and arsenals in Dover and Portland; but section 46 contains some general provisions, including the "Determination of the amount of compensation for land otherwise than by agreement;" and a jury is brought into requisition, as in 5 & 6 Vict. c. 94, save that "Secretary of State" is read in. A cumulative power is given to use, as to lands taken under the Act, the provisions of the "Lands Clauses Act, 1845."

The 26 & 27 Vict. c. 65, which applies to volunteers, does not extend to Ireland; and at all events its provisions for acquiring land for ranges have been repealed.

The 35 & 36 Vict. c. 68, refers to a special expenditure for special purposes—purchase of land at depot centres, building barracks, and otherwise localising military forces, for a metropolitan exercising ground, and for a tactical training station. No compulsory purchase can be resorted to till notice has been given and a local inquiry had. In this Act, the Irish Land Act of 1851, and those amending it, expressly come in, under the definition of Lands Clauses Acts. It is hardly necessary to point out that the lands in the present case are not being acquired under that Act.

The 48 & 49 Vict. c. 36, the "Artillery Rifle Ranges Act, 1885," was also referred to. Section 3 is the only unrepealed one. It relates to the making of by-laws for the use of land abutting on any sea or tidal water. This allows compensation for the injuriously affecting or obstructing of any private right. The definition, as to Ireland, of the Lands Clauses Acts, is "Lands Clauses Consolidation Act, 1845, and Acts amending the same." The Attorney-General attached some importance to this Act; but having regard to the date of the Act, it being before 1890, the definition does not bring in the "Railway Act, 1851, Ireland," or any portion of that code.

The 49 & 50 Vict. c. 5, was repealed in 1892. It has no application to compulsory purchase, and only incorporates Part 5 of the "Volunteer Act, 1863," as to taking lands, which only refers to a taking by agreement.

It is, to my mind, plain that on the 1st of January 1890, when the "Interpretation Act" became law, there was no legislation which authorized the taking of land, for defence or analogous purposes, under the Irish Act of 1851, unless for the special purpose created in 1872, which after eighteen years had, more than probably, ceased to exist. I agree, that from the 1st January, 1890, "Lands Clauses Act," as regards Ireland, will *prima facie* include the Act of 1851, and Acts amending it; and on the same date, with the special exception I have mentioned, the tribunals to settle compensation were—1, under the Defence Act, necessarily a jury; 2, under the Lands Clauses Act, 1845, two modes (*a*), arbi-

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tration without a jury, if the landowner desired; (*b*), in all other cases a jury.

The special code created for Ireland by the Act of 1851, excludes the Arbitration Clauses of the Act of 1845. It begins with the appointment of a Government Arbitrator, but the compensation must in all cases, in the last resort, if the landowner desires, be assessed by a jury; and it provides machinery, for the perfecting of title and entry on the lands, in fact contains almost a perfectly self-contained code.

Though the "Barracks Act, 1890," is practically entirely repealed, it is material, I think, to see what was the true construction of the 4th section. It runs thus:—

"Where land is acquired under the Defence Act, 1842, and the Acts amending the same, the compensation to be paid for the land may, if both parties agree, be settled by arbitration, instead of by reference to a jury, and *thereupon* the provisions of the Lands Clauses Acts shall apply, as in the case of an arbitration under those Acts."

That section, as it rested on volition, was not needed if the lands were being acquired under the Lands Clauses Act, 1845, as its provisions might be called into operation under that Act. In the case of the Defence Act being the one resorted to, it was needed. Does that section, which engrafted a new provision on the existing code, for the sake of excluding a jury, mean that the lands should be thus acquired by a compulsory arbitration ending with a jury? It is plain, I think, that what was intended was to bring in that special department of the Lands Clauses Act, 1845, which settled compensation without a jury. They emanate from the common desire to "settle by arbitration instead of by reference to a jury," words which seem to me wholly inapt for describing the proceedings under the Act of 1851, but most apt, both in words and object, for describing the special proceeding contained in the Act of 1845. I think the application of the implied definition of the Lands Clauses Acts would be repugnant to the object and fair meaning of the words.

The next Act is the Act of 1891, the only unrepealed portion of which is section 11, on which the question in this case mainly turns. It is this: "Where any land is acquired, either under the

Defence Act, 1842, and the Acts amending the same, or for military purposes under any Act with which the Lands Clauses Acts are incorporated, the person or authority acquiring the land may require that the compensation to be paid for the land shall be settled by arbitration, and not by reference to a jury, and thereupon the provisions of the Lands Clauses Acts with reference to arbitration shall, if not already applicable, apply for the purpose of settling the compensation."

The words "or for military purposes under any Act with which the Lands Clauses Acts are incorporated," are, in this instance, necessarily added to the section, because the arbitration is not to be optional, but compulsory at the will of the Secretary of State. Suppose the contention of the Attorney-General is correct, the section would run, so far as applicable to Ireland, as follows: "Where any land is required for military purposes under any Act with which the Railways Act of 1851 is incorporated, the person or authority acquiring the land may require that the compensation to be paid for the land be settled by arbitration, and not by reference to a jury, and thereupon the provisions of the Act of 1851, if not already applicable, shall apply." This interpretation makes the section mean nothing in Ireland, because the desired arbitration existed already by force of the statute, and the benefit conferred amounted in Ireland to nothing, inasmuch as the jury in the last resort remained the assessing tribunal. Surely it means that an arbitration shall arise as a step in the acquisition which would displace the arbitrament of a jury. All the objects are attained if the section means in Ireland what it does in England—that the arbitration clauses in the Act of 1845 shall be applied, just as if, under that Act, the landowner had sought their application. This excludes the jury, and comes in naturally, as a step in the course of acquisition—a requisition bringing in a machinery not applicable if the requisition were not made. What would be the result if the Secretary of State did not "require"? He could not arrest the course of the Act of 1851, when once put in motion, and his abstention from "requiring" would be of no avail.

I do not think that the "Military Lands Act, 1892," affects the question in any way favourably to the Crown. The lands are not being acquired under that Act; and if they were, the same

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question precisely would arise on the language of the 20th section. But, in addition, I think that the provisions of that Act, as to the application to Ireland, are against the contention of the Attorney-General. It is enacted that "An arbitration under this Act shall be carried out in accordance with the provisions of the Lands Clauses Acts." These words do not seem to me applicable to the compulsory proceedings, under the Act of 1851, of the Government Arbitrator, which culminate, whenever there is an appeal, in the arbitrament of a jury.

If I am right in my view of the statutes, the procedure in both England and Ireland will be the same; the compensation will be assessed on the same basis, and in both countries the paramount object desired, of excluding a jury, will have been attained.

It follows, in my opinion, that the arbitrator was not lawfully appointed, and that the proceedings are *coram non judice.*

The question, What evidence, as to compensation, a legally constituted tribunal should receive, is not before us; but it has been carefully considered by the Judges of the Queen's Bench Division, and I do not desire to be understood as holding out any hope that any considered conclusion of mine would be different from theirs.

FITZGIBBON, L. J.:—

It seems to me that the inconsistency in the position taken up by the War Department appears plainly on the face of the first two documents in the case. The original "notice to treat" of November 13, 1894, directed to the owners and occupiers of the lands to be taken, after offering a certain sum, states that, in case of refusal, the Secretary of State "will take all such measures as may be necessary pursuant to the powers and provisions of one or all of the Defence Acts, 1842 to 1873, for obtaining immediate possession . . . and also will require that the compensation to be paid . . . shall be settled *by arbitration*, pursuant to the 11th section of the Ranges Act, 1891, *and not by reference to a jury*; and . . . will take all necessary steps to have an arbitrator appointed pursuant to the statutory powers in that behalf, and to have the compensation . . . determined *by such arbitrator pursuant to the same statutes.*" That notice is

headed:—"In the Matter of . . . the Defence Acts, 1842 to 1873; the Ordnance Board Transfer Act, 1855; and the Ranges Act, 1891, section 11." It makes no mention of the Railways Act, 1851. If there be any process, under the Acts named, by which compensation can be determined by arbitration so as to exclude a jury, this notice plainly states the intention of the War Office to proceed in that way.

When we read the next notice, dated March 4, 1895, the inconsistency appears. It begins:—"Notice is hereby given that, *pursuant to the provisions of the Railways (Ireland) Act, 1851, and the Acts making perpetual and amending the same*, maps or plans, schedules and estimates, relating to" the lands proposed to be acquired, "were on Tuesday, the 29th day of January, 1895, deposited at the offices of the Commissioners of Public Works in Ireland," and that copies of the same had been deposited with the Clerk of the Crown and Peace, and with the Clerk of the Poor Law Union. The document then proceeds:—"And notice is further given that *the said Commissioners have appointed* Joseph Abbott, of No. 113, St. Stephen's-green, Dublin, to be arbitrator between the said Secretary of State and the persons interested in the lands . . . to inquire into and adjudicate upon the value, . . . the purchase money to be paid for said lands, and the compensation to be paid for injury to any lands injuriously affected by the execution of the works, . . . and to inquire and determine what accommodation works should be made and maintained, &c., and all persons claiming to have any interest in the lands specified, or to have any compensation for any injury to any lands injuriously affected, or to have any works made and maintained for the accommodation of adjoining lands, are required to send a statement of their claims to the said Joseph Abbott. And notice is also given that the said arbitrator will sit at the Court House, Blessington, to inquire into and adjudicate upon such claims, *in the manner provided by the above mentioned Acts, and the other Acts relating thereto*, on Thursday, the 18th day of April, 1895, at the hour of 11 o'clock in the forenoon."

The Acts which were mentioned in the heading of the first notice are again set out in the title to the second, but with the

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addition of "The Lands Clauses Acts." There is, besides, in the body of the second notice, the express reference to the "Railways Act (Ireland), 1851, and the Acts making perpetual and amending the same."

Fitz Gibbon, L.J.

The moment it appears that no procedure under the Railways Act, 1851, can exclude a jury, and that proceedings can be taken by arbitration under the "Lands Clauses Acts," properly so called, which will exclude a jury, it appears to me to follow that the appointment of Mr. Abbott under the Railways Act is repugnant to the procedure initiated by the first notice; and this repugnancy appears on the very first documents issued by the War Office, and entered on behalf of the Secretary of State.

On the application of *Bourke*, *Q.C.*, time was given to allow the advisers of the Crown to consider whether they would argue that costs should not be given against the appellant.

May 14.

Bourke, *Q.C.*, and *J. F. Vesey FitzGerald*, for the Secretary of State for War:—

The Crown is not liable to pay the costs. *The Attorney-General* v. *Earl of Ashburnham* (1) shows that the rule that the Crown is not liable to costs apart from a special enactment applies to the present case: Daniell, Ch. Pr., pp. 68, 69, 1267.

Meredith, *Q.C.*, and *Wakeley*, for the respondent:—

The Secretary of State for War, in proceedings like the present, has all the duties and liabilities of the Ordnance officers: 18 & 19 Vict. c. 117, sects. 1, 2, 3. The Ordnance officers were liable to pay costs of such matters: *Secretary of State* v. *Chubbs* (2). The universal practice is that the Secretary of State pays the costs of the owners of land in rifle range cases.

Attorney-General v. *Corporation of London* (3) shows that in equity the Crown may be made liable to costs. The Judicature Act puts costs in the discretion of the Court, and in the event of any variance makes the rules of equity prevail over those of law: *Moore* v. *Smith* (4).

(1) 1 S. & St. 394.
(2) 43 L. T. (N. S.) 83.
(3) 12 Beav. 171; on appeal—2 M'N. & G. App. 271.
(4) 1 Ell. & Ell. 597.

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PER CURIAM:—

The appellant obtained a favour from this Court, when the whole matter was, at the request of the Attorney-General, brought forward for discussion together. When Jessel, M.R., granted a favour to the Crown in *Chubbs' Case* (1), it was on the terms that the liability of the Crown to pay costs should be admitted. Let the case stand till next sittings, to ascertain whether the appellant will persist in contending that the respondent's costs should not be paid by the Crown.

June 2.

Bourke, Q.C., for the Secretary of State for War:—

The appellant does not desire to contend that the respondent should not have his costs of the appeal.

Appeal dismissed with costs.

Solicitor for the appellant: *Sir Patrick Coll.*
Solicitors for the respondent: *J. & J. Galloway.*

G. Y. D.

(1) 43 L. T. (N. S.) 83.

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Nov. 27, 30.
1897.
Jan. 24.

THE RIGHT HON. THE ATTORNEY-GENERAL FOR IRELAND, INFORMANT; THE REV JOHN HALL AND PATRICK BYRNE, DEFENDANTS (1).

Charitable bequest—Masses for the repose of testator's soul—Celebration publicly in Roman Catholic Church—Purpose merely charitable—Legacy duty—Exemption—5 & 6 Vict. c. 82, s. 38.

A bequest to a Roman Catholic priest, to be applied for Masses to be celebrated publicly in a specified Roman Catholic church in Ireland for the repose of the testator's soul, is a valid charitable bequest, and exempt from legacy duty under the 38th section of the 5 & 6 Vict. c. 82.

APPEAL by the informant from the decision of the Exchequer Division, reported [1896] 2 I. R. p. 291, where the facts are fully set out.

The Attorney-General and *The Solicitor-General* (with them *Charles MacDermot*), for the appellant:—

The question is whether, if a testator bequeaths a certain sum to a clergyman to have Masses said for the repose of his soul, the bequest becomes a charity by reason of the testator directing the Masses to be said in public. *The Commissioners of Charitable Donations and Bequests* v. *Walsh* (2) decides that such a bequest is not invalid, *i. e.* that it is not a superstitious use. In *The Attorney-General* v. *Delaney* (3) Palles, C.B., suggested for the first time, that if a bequest for having Masses said were coupled with a direction that the Masses should be said in public, the bequest would become charitable, inasmuch as it would thus tend to public edification. In that case, however, there was no such direction, and as the Masses might be said in private, without departing from the testator's will, the Chief Baron held that the bequests in that case were not charitable. Fitz Gerald, B., concurred in the judgment of the Chief Baron, but desired not to be understood as

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, BARRY, and WALKER, L.JJ.

(2) 7 Ir. Eq. R. 34 *n.*

(3) I. R. 10 C. L. 104.

expressing any opinion that in the case of a bequest for Masses to be said in public for the souls of the dead, the decision of the Court would have been different. Dowse, B., also guarded himself against being supposed to decide the question so raised by the Chief Baron. Indeed, Palles, C.B., himself said:—"It is not necessary, for the purpose of our judgment in the present case, to pronounce any decision on that question, and I expressly guarded myself against being understood as doing so. I merely stated that which is, at present, the leaning of my opinion on the question; but I hold myself perfectly free to alter that opinion, if the case should ever come before me." In *Beresford* v. *Jervis* (1) there was a bequest for Masses, without an express provision that they were to be said in public, though there was something which came very near it, viz. a direction that they were to be said in the chapel at Wexford at particular times. The case came before Sullivan, M.R., who referred to *The Attorney-General* v. *Delaney* (2) as a decision of the greatest weight. He pointed out that, on the terms of the will before him, the testatrix intended to create a perpetuity; that the only distinction which could be drawn between the will before him and that before the Exchequer was that the testatrix directed the Masses to be said in the chapel at Wexford, and he held that this was no substantial distinction, and that therefore the bequest was not charitable. With reference to the question suggested by Palles, C.B., he says:—"I hold myself free to determine, when the question arises, whether if a testatrix directs Masses to be said for individual souls, and directs them to be said in public, that, as a charitable gift, stands or falls. That question will be decided when the point is properly raised." *M'Court* v. *Bennett* (3) is also a decision by Sullivan, M.R., on a bequest for Masses, which was held void as attempting to create a perpetuity, without being a charity. The bequest there was to the clergymen of a cathedral church, as trustees, who were to apply the income of the trust fund "in having three Masses offered up in the said cathedral church on each Sunday in the year" for the repose of the souls of the testator, his wife, and brother. This was plainly a direction

(1) 11 Ir. L. T. R. 128. (2) I. R. 10 C. L. 104. (3) 11 I. L. T. R. 130.

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that the Masses were to be said in public: yet the Master of the Rolls held the bequest was not a charitable bequest. There is a distinction between that case and the present. The clergymen named there were trustees who were to invest the legacy and apply the income not for their own benefit, but in having the Masses offered in the cathedral church. In the present case it is a bequest to a particular individual to say Masses, and on the authorities the gift is good to him as a beneficiary. In *Kehoe* v. *Wilson* (1) there was a bequest for Masses, which it was provided should be said in public. Chatterton, V.-C., held that the bequest was not charitable. [FITZ GIBBON, L.J.: But there the Masses were directed to be said for the benefit of the members of the Third Order of Franciscans. Does not that make a difference?] No. The decision of the Vice-Chancellor went directly on the point whether the direction to say the Masses in a public church open for public worship at the time rendered the bequest charitable by reason of the opportunity it afforded for public edification. The decision of the Vice-Chancellor is that such a direction does render the bequest a charity. The case is therefore an express authority on the question now before the Court. We admit that *Perry* v. *Tuomey* (2) is an authority the other way, because there Porter, M.R., said that but for the decision of Chatterton, V.-C., in *Kehoe* v. *Wilson* (1) he would have held that the direction to say the Masses in public appended to a bequest for Masses made the bequest a valid charity. The same question had again come before the Vice-Chancellor in *Reichenbach* v. *Quinn* (3). The Vice-Chancellor again decided that a bequest to a priest for Masses to be said in public for the testator's soul was not a charity, but that it was a valid gift as to the beneficiary, which it would not be if he got it only as trustee. Lastly, in *Brannigan* v. *Murphy* (4) the Master of the Rolls followed his previous decision in *Perry* v. *Tuomey* (2). Such was the state of the authorities bearing on this question when the present case was argued in the Exchequer Division. The Chief Baron had suggested that the direction to say the Masses in public might make the bequest charitable; but he had guarded himself against being supposed to decide the question;

(1) 7 L. R. Ir. 10.
(2) 21 L. R. Ir. 480.
(3) 21 L. R. Ir. 138.
(4) [1896] 1 Ir. R. 418.

and he had stated that he held himself quite free to decide against the suggestion if the case ever came before him. Fitzgerald and Dowse, BB., had guarded themselves against being supposed to have decided the point. Sullivan, M.R., treated the point as quite open. The Vice-Chancellor had decided the question in the negative, and the Master of the Rolls, though following the Vice-Chancellor, had intimated that his own opinion was in favour of holding such a bequest coupled with the direction for public celebration of the Masses a valid charitable bequest. Yet a great part of the judgment of the Chief Baron in the Court below (1) is taken up with showing that he is not entitled to the credit of having suggested the importance of the distinction created by the direction for public celebration, that when he and Fitzgerald and Dowse, BB., and Sullivan, M.R., referred to the question as still open and undecided, they were all in blank ignorance it had been decided fifty years before in *The Commissioners of Charitable Donations and Bequests* v. *Walsh* (2): that the decision of the Vice-Chancellor in *Kehoe* v. *Wilson* (3) was at variance with Lord Manners' decision in *Walsh's Case* (2), so that the Master of the Rolls, when yielding his own opinion in *Perry* v. *Tuomey* (4) and *Brannigan* v. *Murphy* (5) to that expressed by the Vice-Chancellor in *Kehoe* v. *Wilson* (3), was not aware that the point was actually decided in favour of the view he himself held by the prior authority of Lord Manners' decision in *Walsh's Case* (2).

The language of Lord St. Leonards in the case of *Incorporated Society* v. *Richards* (6) shows that the statutory law defining charitable uses, 43 Eliz. c. 4 (Eng.) and 10 Chas. 1, s. 3, c. 1 (Ir.), is virtually the same in England and Ireland, with one important exception, viz. that the Act of Charles provides "for the maintenance of any minister and preacher of the Holy Word of God," which was purposely omitted from the Statute of Elizabeth. This view of the law is adopted by Lord Halsbury, C., in *The Commissioners, &c., of Income Tax* v. *Pemsel* (7). The English cases

(1) [1896] 2 Ir. R. 291.
(2) 7 Ir. Eq. R. 34 *n.*
(3) 7 L. R. Ir. 10.
(4) 21 L. R. Ir. 480.
(5) [1896] 1 Ir. R. 418.
(6) 1 Dr. & War. at p. 324.
(7) [1891] App. Cas. at p. 545.

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on charities, therefore, apply in Ireland so far as they do not turn on the law against superstitious uses: 1 Ed. 6, c. 14 (Eng.), there being no analogous statute in this country.

The provision in the statute of Charles "for the maintenance of any minister or preacher of the Holy Word of God" is of importance in this case, especially having regard to Bishop Delaney's affidavit, where he says:—"Such *honoraria* for Masses form portion of the ordinary income and means of livelihood of priests, and are generally in Ireland distributed by those to whom the distribution is entrusted, amongst priests whose circumstances are such that they stand in need of the assistance so offered." The Chief Baron asks: "What difference do you make between this and a bequest to maintain public worship?" The answer is: A bequest to say Masses, *per se*, without a provision that they are to be said in public, has never been held to be a charity within the meaning of the words, "For the maintenance of any minister and preacher, &c." That the bequest is not a charity under these words in the statute is plain from the cases cited in which bequests for Masses have been held void; a bequest of money to a priest or a body of priests, for the purpose of saying Masses, has never been upheld as coming within the definition of a bequest for the maintenance of a preacher or minister of the Holy Word of God; so that if the bequests in this case are to be held charitable, it can only be by the fact that the testator has selected a place and mode of saying the Masses which possibly may lead to the edification of the public. A bequest for Masses to be said in private is quite as much an endowment of the clergy as a bequest for Masses to be said in public. And it is admitted that if there be no obligation to say the Masses in public the legacy is not charitable: *Attorney-General* v. *Delaney* (1).

In order to make these bequests good as charitable bequests it must be clear that they necessarily secure the saying of additional Masses—additional opportunities of public edification, not otherwise provided. But Bishop Delaney's affidavit shows that such bequests do not necessarily secure additional opportunities of public edification. He expressly says that the obligation imposed

(1) I. R. 10 C. L. 104.

by the bequest "may be discharged by a Mass which the priest is otherwise obliged to celebrate." Having regard to that statement, no human being can say that this bequest will provide one single opportunity or means of public edification beyond what already exist. Therefore, in the present case, as the trust is one which may be performed without securing any benefit whatsoever to the public beyond what they have got already, it is not charitable.

[FITZ GIBBON, L.J.: Does not that assume that a charity cannot be created for the purpose of securing a better maintenance of existing religious services, by making a better provision for those who have to celebrate them?]

There are a number of cases which show that such an endowment would not be a charity. If it be said that a bequest endowing a clergyman is charitable, the answer is that in every case where a bequest for Masses, whether they were to be celebrated in public or in private, was given to a priest, there was an endowment of that priest; and yet, in every such case, the bequest has before this case been held not charitable. Enriching the clergy for discharging clerical duties is not a charity. There is a long line of authority for that proposition from *West* v. *Shuttleworth* (1) down. In every case in which a testator gave money for Masses he enriched the clergy for the performance of clerical functions, and in every one of those cases the bequests have been decided to be not charitable.

[FITZ GIBBON, L.J.: In those cases it was left undecided by the terms of the bequest whether the clerical function contemplated was one at which the public would have a right to attend. A bequest for the maintenance of public worship has been held charitable.]

A bequest for the maintenance of public worship is a different thing. There is no case that decides that a bequest enriching a clergyman, and putting him under no obligation to discharge duties, is a charity. If every pecuniary benefit conferred on a clergyman is a charity, then all those cases which decided that legacies given for Masses were not charitable legacies were wrongly

(1) 2 M. & K. 684.

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decided. The Chief Baron says (at p. 310) :—"Such a gift tends to the advancement of religion, because it contributes to the support of its minister, and the Court in such a case does not inquire into the *quantum* of his former stipend or the necessity of its increase." That reasoning is quite as applicable to cases where the bequest is for Masses not directed to be said in public. "Similarly," he says, "a gift to the Roman Catholic clergyman for the time being of a particular Church or district is charitable"; and he cites *Thornber* v. *Wilson* (1). But that was a case where endowments were devised to two particular chapels to be enjoyed by the ministers officiating in those chapels, as they were appointed to them, and the devises were held void under the Statute of Mortmain. *Grieves* v. *Case* (2) was also an endowment of a chapel. Neither of these cases sustain the proposition that a bequest to a clergyman is necessarily an endowment of religion. So, too, *Durour* v. *Motteux* (3) and *Turner* v. *Ogden* (4) were both cases where the testator attempted to endow particular chapels. No case can be cited to show that gifts to clergymen are necessarily charities, and that placing trust money in the hands of a clergyman constitutes a charity. You must show that the public have an interest in the trust, that they will derive some benefit from it, and you must also show that the trust is one that can be enforced and carried out.

Several cases were cited in the Court below, where sums of money given for the procurement of certain religious services were held charitable bequests: *Durour* v. *Motteux* (3); *Turner* v. *Ogden* (4); *Yeap Cheah Neo* v. *Ong Cheng Neo* (5). We do not dispute that money given to secure the performance of religious worship may be a charity; but we say that this case is different from every cited case, because in every one of those cases the Court could see that the trust was performed. A charitable trust must be such a trust as can be carried out under the supervision or control of the Court: *Morice* v. *Bishop of Durham* (6); *Stewart* v. *Green* (7); *Ommanney* v. *Butcher* (8). In the cases where money was given for preaching a sermon in memory of the testator, or

(1) 3 Drew. 245.
(2) 2 Cox Ch. Cas. 301.
(3) 1 Ves. Sen. 320.
(4) 1 Cox Ch. Cas. 316.
(5) L. R. 6 P. C. C. 381.
(6) 9 Ves. 399; 10 Ves. 521.
(7) Ir. R. 5 Eq. 470.
(8) T. & R. 260.

for singing psalms, the Court could see that the trust was carried into execution. There is no way when a Mass is said of ascertaining whether it is said for the repose of the soul of the testator or not: whether the Mass be said for the repose of the testator's soul depends entirely on a mental act and intention on the part of the celebrant. As Bishop Delaney has shown:—"That obligation is discharged by a mental act of the priest intending to apply the Mass to that particular purpose, and it is not necessary to pronounce aloud the name of the person for whom the Mass is offered." In the Court below it was suggested that this difficulty could be got over by requiring an affidavit from the priest that he had performed his trust. But that is not what is meant by the authorities which say that the Court must be able to see that the trust is carried out. In the case of no other charitable trust, would an affidavit by the trustee that he had discharged his trust satisfy the Court.

[FITZ GIBBON, L. J.: You say that it is vital that the Mass shall be for the repose of the soul of the testator—in fact you are making the testator the *cestui que trust*. I doubt very much whether that is a subject that the Court can enter into at all.]

It is for that reason—because the Court cannot enter into it or take any cognizance of it—that we say that this is not a trust which can be carried out by the Court, and therefore is not charitable.

[FITZ GIBBON, L.J.: The question of law with which we have to deal is whether a Mass, celebrated in public, as this bequest directs it to be, will or will not, in itself, be necessarily an act of public benefit. If so, I confess I cannot see how it becomes less so because it is directed to be said for the repose of the soul of the testator.]

We do not say that the Mass thereby ceases to be a means of public edification; but we say that is not what the bequest is left for.

The primary and main purpose, and almost the sole purpose, of this bequest is personal benefit, and the public advantage, if there be any public advantage, is only an incident arising from the mode and manner in which the personal benefit is to be attained. A bequest is not charitable, the main purpose

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of which is the personal benefit of the testator. The main object of the testator was to get for himself the spiritual advantage of having the Masses said for him; the edification of the public is only an incident that arises in the way he directs his purpose to be carried out. The Chief Baron apparently was under the impression that the argument on behalf of the Attorney-General was that the *motive* which was in the testator's mind in making the bequest altered the character of the gift. No such argument was put forward. Motive has nothing to do with the matter. It would be plainly untenable to maintain that a bequest for the purpose of building a church, if given from religious feeling, would be a charity; but that the same gift, if given from a feeling of vain glory would not be a charity. An illustration will make our argument plain. If a testator leaves money to endow a picture gallery for the edification and cultivation of the public taste, that is a charitable bequest; but if a testator leaves a sum of money to put up a splendid monument to himself in a public thoroughfare, though the bequest may afford an opportunity of public edification and cultivation of public taste in those who pass by and see the monument, yet it is not a charitable bequest, because the main purpose and object of the bequest is to erect a monument to perpetuate the testator's own memory, although it may incidentally confer some public advantage. Here the Masses are to be Masses for the repose of the testator's soul: that is the essential thing; the incidental part of the bequest is that the Masses are "to be celebrated publicly in said church." The place where the Masses were to be said, and the mode of celebration were only the mode and manner in which the main object and purpose was to be secured.

[LORD ASHBOURNE, C.: Take the case of a bequest for the erection of a mural tablet in a church with the ordinary inscription:—"To the glory of God and in memory of A. B." Would the direction that it should be for the glory of God affect the question?]

No. Bequests to erect monuments or mural tablets in a church have never been held to be charitable on that ground. Such bequests are upheld as charitable, as tending to support and maintain the fabric of the church, one of the objects mentioned in the

43 Eliz. c. 4 (Eng.) and the 10 Chas. 1, c. 3, sect. 1 (Ir.); and a distinction is drawn for that very reason between a monument in a church and a monument in a graveyard outside the church, as the latter does not tend to maintain the fabric of the church.

Now as to *The Commissioners of Charitable Donations and Bequests* v. *Walsh* (1), the record in that case, including the charge filed by the reverend gentlemen claiming the legacies, the discharge filed by the plaintiffs, the draft report of Master Henn, the plaintiffs' objection to the draft report, the report of the Master, and the exception, conclusively shows that the only question raised in that case was whether the bequests were for superstitious uses. The same question and no other was involved in *Read* v. *Hodgens* (2). It is therefore no authority that the bequests in this case are charitable.

Carton, Q.C., and *O'Connor, Q.C.* (with them *D. F. Browne*), for the respondent :—

The narrow limit sought to be put on a gift for charity by the appellant, namely, that it must be for a particular church as an endowment for that particular church, or for services in a particular church, is not well founded. A gift which executors are at their discretion to spend in the service of God is a valid charity : *Powerscourt* v. *Powerscourt* (3) ; *Farquhar* v. *Darling* (4). These cases also establish that in order that a bequest for a pious use should be held a valid charitable gift, it is not necessary that the Court can see that the trust is performed. In the case of a bequest for Masses, the Court always pays the money to the legatee direct, who is named in the will : *Bradshaw* v. *Jackman* (5) ; *Reichenbach* v. *Quin* (6).

We submit that this case falls within the third division of the four classes of Charitable Trusts stated by Lord M'Naghten in *The Commissioners of Income Tax* v. *Pemsel* (7), viz. "Trusts for the advancement of religion."

(1) 7 Ir. Eq. R. 34 *n.*
(2) *Ibid.* 34.
(3) 1 Molloy, 616.
(4) [1896] 1 Ch. 50.
(5) 21 L. R. Ir. 12.
(6) *Ibid.* 138.
(7) [1891] App. Cas. at p. 583.

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It has been decided, in a long line of cases, that trusts for the advancement of religion are charitable, quite irrespective of the nature of the religion or the nature of the religious work performed. Anything that tends to the advancement of public worship, whether ancillary to public worship or to found public worship, is a good charitable gift. For instance, a gift for the support of a minister to enable him the better to discharge his office: *Parker's Charity* (1); *Michel's Trusts* (2); *Strauss* v. *Goldsmid* (3); a gift directing a particular form of worship; *Turner* v. *Ogden* (4); *Durour* v. *Motteux* (5); or a gift towards the maintenance of the fabric of the church: *Hoare* v. *Osborne* (6). Besides in Ireland gifts "for the maintenance of any minister or preacher of the Holy Word of God," are recognised as charitable by statute (10 Chas. 1, s. 3, c. 1). Inasmuch as a gift for the maintenance of public worship is a good charitable gift, a bequest for Masses to be said in public is a good charitable gift. How can the direction of the testator that the Masses are to be offered for the repose of his soul deprive the bequest of its otherwise charitable character? The *purpose* of the bequest is the purpose of saying Masses, which is a charitable purpose as tending to public edification. Possibly, the *motive* for the bequest was the repose of the testator's soul; but that does not prevent the public deriving the benefit from the means of edification provided by the bequest. In *Hoare* v. *Osborne* (6), the motive of the testatrix manifestly was the preservation of her brother's memory, but the purpose of bequest was the putting up of the window which was a good charity as tending towards the maintenance of the fabric of the church. "If the object be itself charitable, the state of mind which influenced the testator to give the legacy is immaterial:" *per* Porter, M.R., in *Perry* v. *Tuomey* (7).

The argument that if the same number of Masses only were said after the bequest as before, the bequest would not be a charity, as there would be no additional public edification, mistakes the legal doctrine applicable to charity. If the purpose of the

(1) 32 Beav. 654.
(2) 28 Beav. 39.
(3) 8 Sim. 614.
(4) 1 Cox Ch. Cas. 316.
(5) 1 Ves. Sen. 320.
(6) L. R. 1 Eq. 585.
(7) 21 L. R. Ir. at p. 484.

donor was the public benefit the Court never investigates whether the result must necessarily be a benefit not otherwise attainable.

If the argument is good that this bequest must fail because the Court cannot carry it out, then the bequest fails altogether, and there is no gift upon which legacy duty can attach. But there is no difficulty in carrying out the purpose of the testator; he wished to have Masses said in public; he trusted the clergyman; the Court will trust the clergyman and pay the legacy to him: *Blount* v. *Viditz* (1); *Bradshaw* v. *Jackman* (2); *Reichenbach* v. *Quinn* (3).

The Commissioners of Charitable Donations and Bequests v. *Walsh* (4), has decided that a bequest like the present is a charitable bequest. To say that that case only decided such a bequest is not void as a superstitious use, overlooks, first, the nature of the bequest in that case, and secondly the specific finding that it was a charitable legacy. The terms of the will of Judith Rush prove that the services for which she left the bequest were public services. It was objected that the bequest was for a superstitious use, and therefore void; but it was conceded that if it was not void on this ground it was a charitable gift.

[They referred also to *White* v. *White* (5), and *Cocks* v. *Manners* (6)].

Cur. adv. vult.

1897.
Jan. 24.

LORD ASHBOURNE, C.:—

This is an information filed by the Attorney-General for the recovery of legacy duty: which is met by the defence that the legacies were given for purposes "merely charitable in Ireland," and as such not chargeable with duty. The question arises on the Statute in reference to three legacies of £50 each, which the testator directed should, to use his own words, "be applied for Masses for the repose of my soul, and my wife's soul, to be celebrated publicly" in three Roman Catholic Churches in Dublin, which he specified. It is not suggested that the bequests are illegal. It is conceded, that in Ireland bequests for Masses for

(1) [1895] 1 I. R. 42.
(2) 21 L. R. Ir. 12.
(3) *Ibid.* 138.
(4) 7 Ir. Eq. R. 34 *n.*
(5) [1893] 2 Ch. 41.
(6) L. R. 12 Eq. 574.

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deceased persons are not illegal. It is not denied, if not expressly admitted, that bequests for the general advancement of the Roman Catholic religion, or for the benefit of its clergy, would be regarded as charitable; it is not denied that bequests for the saying of Masses in public would also be regarded as safe from the attacks of the Attorney-General. It is, however, contended in this case for the Crown, that as the Masses are to be celebrated with a particular memorial, the existence of which rests in the mental intention of the priest, a Court of Equity would decline to give effect to the purpose of a trust which it could not control.

The case was fully argued before the Exchequer Division, and the learned Judges of that Court decided against the Crown, the Lord Chief Baron giving a most careful and elaborate judgment, and we have now to decide the case on appeal. Are the testator's bequests for Masses to be celebrated publicly in these specified Roman Catholic Churches for the repose of the souls of himself and his wife exempt from legacy duty as valid charitable bequests under section 38 of 5 & 6 Vict. c. 82?

The validity of the bequests is not questioned, nor could it be, since the cases of *The Commissioners of Charitable Donations and Bequests* v. *Walsh* (1), and *Read* v. *Hodgens* (2). It is not denied that a gift for Masses to be said in public is a charity, nor that a religious purpose may be a good charitable purpose. The act of carrying it out confers a public benefit on the members of a religion by tending to their religious edification. It was pointed out in *The Attorney-General* v. *Delaney* (3), by the Lord Chief Baron (although the other Judges present entirely declined to commit themselves on the point), that to confer public benefit the Masses should be celebrated in public, and, accordingly, since that case, that provision is usually found in such legacies, and is present in those now under discussion. But then the Crown contends, that the addition of words providing that the Masses, so to be said in public, were to be for the repose of the souls of testator and his wife, makes a supreme difference. The Attorney-General urges that a Court of Equity could not ascertain whether this intention was complied with—that this was the governing purpose in the mind of the

(1) 7 Ir. Eq. R. 34 *n.* (2) 7 Ir. Eq. R. 34. (3) Ir. R. 10 C. L. 104.

testator—and also that it could not be satisfied without celebrating additional Masses. Having regard to the evidence of the service of the Mass, I cannot follow this argument. It is celebrated publicly, in church before the people for edification and religious profit, and no matter what the motive may have been, this public purpose must be fulfilled. Although no express provision may be made by the bequests for the celebration of additional Masses, a legal obligation for the celebration of Masses is provided from the legacies which otherwise would not have existed. The Court would, I assume, trust the clergyman, as the testator did by his will, that he would fulfil the trust to celebrate memorial Masses; but it cannot be said that it would be impossible for a Court to ascertain whether the objects were actually satisfied, for I suppose the celebrating priest could, if necessary, prove it.

It is not necessary to discuss with any detail the numerous decisions cited. I am not concerned to trace the first germs of any distinction being taken between bequests to celebrate Masses in public or private. I find that the current of decisions in Ireland support the view that legacies like the present should be upheld as charitable. The case of *The Commissioners of Charitable Donations and Bequests* v. *Walsh* (1) decided that gifts for three solemn Masses for the repose of the soul of the testatrix, apparently to be said in public, were part of "the charitable uses and purposes of the will" in question. This case in its marginal note and in the general scheme of its report appears to largely turn upon the question of the legal validity of the bequest; but I think that the Chief Baron is warranted in pointing out that its facts and circumstances involved wider issues and that the bequests there were upheld not only as not being void, but as charitable. In the case of the *Attorney-General* v. *Delaney* (2) the bequest was held not to be charitable; but there was no direction there that the Masses should be celebrated in public—a distinction referred to in his judgment by the Chief Baron. The decision of the Vice-Chancellor in *Kehoe* v. *Wilson* (3), it is true, is the other way; but the case is not very fully reported, and we may not have all the facts

(1) 7 Ir. Eq. R. 34 *n*. (2) Ir. R. 10 C. L. 104. (3) 7 L. R. Ir. 10.

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and arguments of that case before us. The Master of the Rolls in *Perry* v. *Tuomey* (1) felt bound to follow *Kehoe* v. *Wilson* (2), although he expressed his strong dissent from it, and made it most plain that he would have assented to the reasoning of the judgment of the Exchequer Division in this case if he felt himself free.

Then there are a vast number of cases which indicate how far courts have gone to support religious purposes as charitable purposes, and thus lead the mind to so regard bequests like the present. In *Powerscourt* v. *Powerscourt* (3) a devise by a testator to lay out at their discretion £2000 per annum till his son came of age "in the service of my Lord and Master, and I trust Redeemer," was held to be a good charitable devise. In *Durour* v. *Motteux* (4) it was held that the grant of a perpetual annuity to a minister to preach a sermon once a year to the memory of the testator was a charitable use. In numerous cases gifts for the benefit of public religious worship were held to be charitable. *Hoare* v. *Osborne* (5) is a case which shows that no matter what the motive, the benefit and advantage to a church will support a legacy as charitable. The decisions of the English Courts largely rest on the Statute of Superstitious Uses (1 Edw. 6, c. 14), and it is not necessary to discuss them in any detail for the purposes of our decision. In the present case I am of opinion that the decision of the Exchequer Division is correct, and should be affirmed and this appeal dismissed with costs.

FITZ GIBBON, L.J. :—

The Irish decisions have brought the question in this case to the point at which it now comes before this Court for the first time, by a course of authority which has undergone a curious process of development. In 1844, in *Read* v. *Hodgens* (6), the Master of the Rolls, Mr. Blackburne, said that the question of the *invalidity* of a bequest to have Masses said for the soul of the testator "was argued with very great ability at the Bar," and that he "had given all the time and attention to the case which it was in his

(1) 21 L. R. Ir. 480.
(2) 7 L. R. Ir. 10.
(3) 1 Molloy, 616.
(4) 1 Ves. Sen. 320.
(5) L. R. 1 Eq. 585.
(6) 7 Ir. Eq. R. 34.

power to command." But, before he had formed an opinion upon it, he "was put in possession of the decree" in *The Commissioners of Charitable Donations and Bequests* v. *Walsh* (1), decided by Lord Manners in 1823, which he found to be "a decision on the very question," and, on the authority of Lord Manners, then twenty-one years old, he held it his "duty to declare that the bequest was *valid*." He stated "the proceedings and facts of that case, as it had not been reported," and these are fully set out and printed in a note in 7 Ir. Eq. Rep., published in 1844-5.

The Master of the Rolls stated the ground of the plaintiff's exception in *Walsh's Case* (1) to have been that the Master ought to have found that the bequest for Masses for the repose of the testator's soul was *void and against law;* that the case had been argued before the Lord Chancellor for two days, and it was impossible to deny that it was fully considered. Lord Manners by his decree overruled the exception, and ordered that the report should stand absolutely confirmed, and that the executors should pay to the clergymen of Mullingar the sums bequeathed for Masses, "*as well as other sums bequeathed for charitable uses.*" The Master of the Rolls concludes: "This case, in my opinion, closes all further discussion on this point, and in deference to the decree, I am bound to allow the demurrer." There is no trace of any distinction having been taken between the bequest in *Read* v. *Hodgens* (2) and that in *Walsh's Case* (1). The Master of the Rolls mentions the sums bequeathed for Masses, with the "other sums bequeathed for charitable uses." He refers to *Walsh* v. *Gladstone* (3), decided by Lord Lyndhurst in 1843, in language to which I must recur, as indicating what he treated as the question decided by Lord Manners in a manner which bound him in *Read* v. *Hodgens* (2). He quotes from the decree in *Walsh's Case* (1), which directed the payment of eight specified sums to the clergymen who were to celebrate the Masses "to be applied by them to and for the *charitable* uses and purposes in the will of the testatrix." He gives no indication that he was not bound to treat the legacy with which he had to deal in the same way. Yet in *Read* v. *Hodgens* (2) the bequest was in these words: "If, after

(1) 7 Ir. Eq. R. 34 *n.* (2) 7 Ir. Eq. R. 34. (3) 1 Phil. 290.

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her" (the testator's sister's) "demise there remains any residue, I direct such residue *to be expended for Masses for my soul's sake.*" There was a question on the language of the will, which was abandoned, whether the bequest was not contingent upon the testator's dying in a foreign country, but there was no direction whatever as to the mode of celebrating the Masses.

From 1843 to 1875, we cannot conjecture whether such legacies were, in fact, subjected to legacy duty, or were regarded as charitable, but there is no reason to suppose that any difference was made between public and private celebrations, until the case of *The Attorney-General* v. *Delaney* (1) came before the Exchequer in 1875. In that case the Chief Baron used language tending to show that all such bequests are charitable, no matter how the Masses are celebrated. He spoke of "the element of charity, in its most extensive, indeed, in its truest sense," and he said that, according to the Roman Catholic faith, each celebration of the Mass involves "the most perfect act of charity." But, though he said that if the will had prescribed that the Masses should be celebrated in public, in a specified church or chapel in Ireland, it would appear to him that the bequests would be charitable, as gifts for the public celebration of an act of religious worship, and though he said that "the spiritual edification and the benefits spiritual and temporal resulting from the Sacrifice of the Mass, according to the Roman Catholic faith, extend to the entire Christian Church," he held that such edification and benefits were not public benefits in the sense in which such benefits render a trust or purpose charitable, and he concurred in the decision that legacy duty was payable upon the bequests for Masses, in the absence of an express direction for public celebration. Fitz Gerald, B., and Dowse, B., guarded themselves, the former against expressing any opinion, and the latter against being supposed in any way to countenance the idea, that a bequest for Masses to be said in public for the souls of the dead would have been charitable. Deasy, L.J., concurred in the decision, but was "not to be understood as responsible for any of the reasons which had been adduced in support of it." Under these circumstances, the only common ground for the conclusion of the Court, that a

(1) I. R. 10 C. L. 104.

bequest for Masses was not charitable, which we can find in the judgments, must be that stated in general terms by the Chief Baron (at page 128), that the celebration of the Masses for the repose of the souls of the testatrix, and of her deceased brother, Timothy, did not tend, directly or indirectly, to the benefit of the public. We cannot conjecture whether the difficulty in seeing to the execution of the trust; its being "mixed up with" general moral duty; its not being "of such a tangible nature as that the Court can deal with it"; its being "merely pious"; or that the benefits which, according to the Roman Catholic creed, would flow from its execution, being spiritual, were "not public benefits in the sense in which such benefits render a trust or purpose charitable," formed the *ratio decidendi* in the mind of any one or more of the eminent Judges who concurred in the decision.

Under these circumstances, I find it necessary to look more deeply for the real foundation of the law which the Attorney-General has expressly declined to challenge, viz.:—that bequests for Masses are valid, in order to see whether it is possible to base their validity upon any principle which will not also establish their charitable character, irrespectively of the mode of celebration.

The Vice-Chancellor's decision in *Kehoe* v. *Wilson* (1), in 1880, cannot be reconciled with the other authorities, unless it turned upon the point that the principal objects of the bequests were the monks of illegal orders, and that the bequests were consequently illegal, notwithstanding that the members of those orders, as legatees, were directed to celebrate the Masses in the course of public worship.

It would be the natural result of the decision in *Delaney's Case* (2) that *all* bequests for Masses since 1875 should be charged with duty, until the question was raised in the present case to test the Lord Chief Baron's suggestion, that such bequests would acquire a charitable character by an express direction that the Masses should be celebrated in public.

In 1896, in the present case, the Lord Chief Baron fell back, as the Master of the Rolls had done in 1844, upon the unreported decision of Lord Manners in 1823, and held it to be "a decision upon the very question." But if it was, how are we to treat the

(1) 7 L. R. Ir. 10. (2) I. R. 10 C. L. 104.

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decision in *Read* v. *Hodgens* (1), which followed Lord Manners, and applied the decision upon the "charitable uses" of Judith Rush's will to Nicholas Kearns' bequest of his residue "to be expended for Masses for his soul's sake," without any indication whatever that those Masses were to be said in public?

I confess to a feeling of extreme regret that we have no means of ascertaining either the grounds or the extent of Lord Manners' judgment, and that Mr. Blackburne gave no judgment of his own upon the question, and even indicated that he had not formed any opinion upon it. But I cannot believe that the charitable or non-charitable character of the bequests was regarded by either of these Judges as depending upon the mode of celebrating the Masses, and I am almost forced to the conclusion that both Judges upheld the bequests as being charitable. If Lord Manners did so, I think it clear that Mr. Blackburne thought that he was doing likewise.

In *Read* v. *Hodgens* (1), the argument in favour of their validity was put in this way: "Upon a careful examination of the cases . . . it will be found that wherever the use or trust which was held void was so held as contravening a policy of the law not referable and referred to the Statute of Superstitious Uses, it was one, the execution of which would have involved not merely the performance by Roman Catholics of a Roman Catholic act of worship, or a religious rite efficacious in the estimation of Roman Catholics only, but the dissemination, . . . of Roman Catholic doctrine, or the establishment of Roman Catholic institutions; . . . and that, wherever the use or trust held to be void was such as that now before the Court, relating to the mere performance by and amongst Roman Catholics of the rites peculiar to their religion, without involving any dissemination of its doctrines, its invalidity is clearly referred not to a policy referable to the establishment *per se* of the Reformation in England, but to the policy of the Statute of Superstitious Uses, which does not extend to this country." This argument must be remembered when we find Mr. Blackburne, in his judgment, referring to *Walsh* v. *Gladstone* (2), as "bearing on the general question that had been discussed before him." That case has no bearing

(1) 7 Ir. Eq. R. 34. (2) 1 Phil. 290.

at all except upon an admittedly charitable legacy. It was a decision of Lyndhurst, L.C., upholding a legacy which had been given to a deceased President, to be applied for the use of a certain college for the education of Roman Catholics. The question was whether the legacy was to be paid to the succeeding President, or to be administered under a scheme, as a charitable legacy. Lord Lyndhurst says:—"Where a testator who is a Roman Catholic leaves money for the use of a Roman Catholic establishment, all I have to do is to see that it is applied to the use of that establishment, and that it is paid into hands in which it will be safe. I have nothing to do with the internal management, discipline, or mode of education in such an institution." Having called for evidence respecting the nature of the institution, and the situation and character of its President, he said, on further consideration: "It may be that the testator, if he had been living, would have had a discretion as to the application of the fund, but it would have been a fair exercise of that discretion to have paid it over to the President, and if I am of opinion that it will be safe in his hands, the Court will be justified in doing the same. Now I think it is quite clear from the affidavits that the money will be quite safe in the hands of the President, and if that be so, how can it be better applied for the use of the college than by paying it to the individual who has the management of the general affairs of the institution." Accordingly he dismissed the petition of the Attorney-General to have a scheme settled. The reference to this case is unmeaning, unless the Master of the Rolls thought he was dealing with a charitable bequest, and it indicates that when he came to pay the bequest for Masses, he would be prepared to entrust it to some clergyman or clergymen who would carry out the testator's wishes. It, at all events, opposes the authority of Lord Lyndhurst to the contention of the Attorney-General that the impossibility of securing the remembrance of the testator by the celebrating priest would, of itself, prevent the bequest from being recognised as charitable, and it is a striking instance of the unwillingness of the Court of Chancery to defeat a charitable bequest because it cannot completely secure the performance of the testator's wish by those to whom he desires to give his money.

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But, I repeat, neither in *The Commissioners, &c.* v. *Walsh* (1), nor in *Read* v. *Hodgens* (2), can I find any trace of importance attached to the presence in the one bequest, or to the absence from the other, of a direction as to the mode of celebrating the Masses. In *Read* v. *Hodgens* (2), the words were absolutely general, and in *Walsh's Case* (1), the public celebration is left to be inferred from the epithet "solemn," and from the desire of the testatrix, if possible, to have thirteen clergymen to perform "the rites accustomed on these occasions." Until the Chief Baron's judgment in this case, no one—not even the Chief Baron himself, in *The Attorney-General* v. *Delaney* (3)— seems to have thought that Lord Manners' order to pay the legacies to the clergymen named to be applied to the charitable uses in the will, depended at all on these words, or that the absence of any such words could have qualified the applicability of the decision to the bequest in *Read* v. *Hodgens* (2). If the Chief Baron is right in thinking that Lord Manners held the bequest in *Walsh's Case* (1), to be charitable, and therefore not liable to legacy duty, I should conclude that the Master of the Rolls came to the same conclusion as to the bequest in *Read* v. *Hodgens* (2), and the result would be to render the decision in *The Attorney-General* v. *Delaney* (3), inconsistent with that in *Read* v. *Hodgens* (2). But I am willing to assume that the question of liability to duty was not discussed, and whether it was or not, we must consider and decide it now.

I must repeat that the Attorney-General opened this appeal by expressly disclaiming any intention to question the *validity* of bequests for Masses; in fact, he could not do so, on an information to recover legacy duty upon them. We are, therefore, bound to assume the *validity* of the bequests, but in determining whether they are charitable, I must ascertain the ground upon which their validity rests. I confess myself unable to reconcile the decision in *The Attorney-General* v. *Delaney* (3), with those of Lord Manners and Mr. Blackburne, in the absence of any trace of a distinction being taken, until 1895, between *requiem* Masses to be said in public, and *requiem* Masses said without any express direction as to the mode of celebration. I say nothing about the effect

(1) 7 Ir. Eq. R. 34 *n.* (2) 7 Ir. Eq. R. 34. (3) I. R. 10 C. L. 104.

of an express direction—if there ever was such a direction—that Masses should be said in private. Where there is no direction, as in *Read* v. *Hodgens* (1), we have evidence that, in ordinary course, the Masses are celebrated publicly.

It seems to me that the Statute against Superstitious Uses must be the sole ground of the difference between the decisions in England and in Ireland. That which the unrepealed Statute (1 Edw. 6, c. 14) in England describes as the cause of a great part of the superstitions and errors in Christian religion, and as "resting on vain opinions of purgatory and Masses satisfactory . . . to be done for them which be departed," is, in Ireland, a vital part of the religion professed by the majority of the subjects of the Crown. No Statute, at least since 1869, and no judicial authority, is hostile to the absolute equality, before the law, of the religious tenets of all recognised denominations in Ireland. In Bacon's Abridgment Charitable Uses, C., p. 36, I find, "It seems settled that money given *for the maintenance of a preaching minister*, though not a charitable use mentioned in the Statute, yet comes within the equity of it, for *summa est ratio quae pro religione facit.*" It has been held that Roman Catholic, Nonconformist, Jewish, and even secular communities are objects for whose edification or benefit bequests may be made which will be upheld as charitable, and as given for the public benefit. The principle of the Common Law and of the judicial decisions, both in England and in Ireland, where the Statute of Superstitious Uses does not come in, seems identical with that which the philosophic historian describes as "the policy of the Emperors and Senate of Rome, as far as it concerned Religion"—in the Age of the Antonines—"The various modes of worship which prevailed in the Roman world were all considered . . . by the magistrates as equally useful." It is proved that bequests and donations for the celebration of Masses form a recognised form of remuneration, or endowment, for the maintenance of Roman Catholic clergymen, and I cannot think that the temporal Courts are to compare, or to contrast, the public benefit involved in the religious ministrations of clergy of different denominations, where those ministrations, according to the creed

(1) 7 Ir. Eq. R. 34.

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and ritual of the Church concerned, edify and benefit those who participate in them.

The evidence in *The Attorney-General* v. *Delaney* (1) has been by consent made available in the present case to show the character of a bequest for Masses, so far as it depends upon the nature of the Mass itself as understood by Roman Catholics. This evidence is but a paraphrase of the Decrees of the Council of Trent. Not as taking judicial cognizance of those Decrees, but for precision and brevity, I quote extracts from two passages (Decr. Conc. Trid., sess. xxii., 5 and 6): "In divino . . . sacrificio quod in missa peragitur, docet Sancta Synodus sacrificium istud vere propitiatorium esse, per ipsumque fieri ut si, cum vero corde et rectâ fide, cum metu et reverentiâ, contriti ac pœnitentes ad Deum accedamus, misericordiam consequamur, et gratiam inveniamus, in auxilio opportuno . . . Non solum pro fidelium vivorum peccatis, pœnis, satisfactionibus, et aliis necessitatibus, sed et pro defunctis in Christo, nondum ad plenum purgatis, rite juxta Apostolorum traditionem offertur." Again: "Optaret quidem Sacrosancta Synodus ut in singulis missis fideles adstantes communicarent: nec tamen, si id non semper fiat, propterea missas illas, in quibus solus sacerdos sacramentaliter communicat, ut privatas et illicitas damnat, sed probat atque adeo commendat, si quidem illæ quoque missæ vere communes censeri debent; partim quod in eis populus spiritualiter communicet, partim vero quod *a publico ecclesiæ ministro* non pro se tantum, sed *pro omnibus fidelibus* qui ad Corpus Christi pertinent celebrantur." I cannot conceive it to be a proper exercise of the jurisdiction of a temporal Court, in a country professing to be governed upon principles of absolute religious equality, to discuss religious doctrines. Nor can I conceive it possible that the liability to duty of a legacy for the benefit of a public minister of religion can, in law, depend upon considering the efficacy of his ministrations, or whether, or how far, benefits which are conscientiously believed by the members of his own denomination to flow from prescribed ceremonies, are really attainable. The support of a public minister of any religion in the exercise of his functions, for the benefit of the members of his

(1) Ir. R. 10 C. L. 104.

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own flock generally, must, I think, be held charitable for our purpose. But it is not necessary to go so far.

It is enough to say that where, according to the religious belief of a body of persons recognised as part of the public, an act of religion done by a public minister of their Church, is for the spiritual advantage of them all, a bequest for the benefit of a minister of religion to perform that act must be deemed charitable. We have not now *to decide* whether *The Attorney-General* v. *Delaney* (1) is or is not law, because the edifying effect of the Masses which our testator has directed to be celebrated in public cannot, in Roman Catholic belief, be confined to the testator, and they are of necessity essentially acts of public worship, open to, and benefiting, all who participate, or who have the opportunity of participating in them. The appellant's argument to the contrary seems to me to lead to the dilemma—inasmuch as a Mass publicly celebrated is the most solemn act of worship in the Roman Catholic Church, and when so celebrated results in necessary benefit and religious edification to all the faithful participating in it—*either* that such a Mass, though celebrated with a special intention as a memorial of a deceased person, must nevertheless be charitable; *or* that no bequest for Masses can be charitable, notwithstanding the religious belief of Roman Catholics that, whether there is any special intention or not, benefit or edification equally results from the rite to all faithful participants.

I can add nothing to the arguments and authorities given by the Chief Baron to show that the motive of the testator being, to some extent, that of securing a spiritual benefit for himself cannot deprive the ceremony of the charitable character which it derives from its edifying effect on others. In dealing with such an argument I may be pardoned for using ethical terms. A gift, of which the necessary result is *altruistic* public benefit, does not fail to be "merely charitable," because it originates in an *egoistic* motive. In plain English, if nothing could be charitable which was done with the motive of obtaining a personal benefit, here or hereafter, few charitable acts could stand the test, and unless we hold that a self-interested motive is necessarily uncharitable, we

(1) I. R. 10 C L. 104.

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cannot deprive public benefits of a charitable character by inquiring into the motive which dictated them.

To the other point, much insisted upon by the Crown, that there was no means of enforcing the remembrance of the testator by the legatee, and therefore that, because the intention could not be secured, the bequest was not charitable, there are three answers:—First, that given by Lord Lyndhurst in *Walsh* v. *Gladstone* (1), the testator trusted the legatee to execute his charitable intentions, and therefore the Court will do so; secondly, as the efficacy of the Mass, according to the Roman Catholic religion, depends, in all cases, upon the intention of the priest, the argument goes too far, and, if pushed to its logical conclusion, it would destroy the validity of every such bequest. But lastly, there is no more difficulty in securing the public celebration of a Mass than there is in securing the public delivery of a sermon, or a lecture, or the public discharge of any other function, charitable or not. I find it impossible to hold that a bequest for the better maintenance, or otherwise for the benefit, of a Roman Catholic priest, who is to celebrate Mass in public is not charitable, when a bequest for sermons, and for lectures, and for ministers, of other denominations, and even such vague religious bequests as those in *Powerscourt* v. *Powerscourt* (2), and *Lea* v. *Cooke* (3), have been held to be valid and charitable. If the impossibility of securing the desired intention could affect the trust for a *requiem* Mass, the impossibility of securing the orthodoxy, in the testator's sense, of the sermon, or the lecture, or the minister, must have the same effect.

For these reasons, while I decide this case upon the ground that the public celebration of Mass, and the making of a pecuniary provision for a clergyman in return for such public celebration, being admitted to be valid, is a good charitable object, I have added the remarks which I have made, because I am not willing to limit the foundation of my judgment by accepting the decision in *The Attorney-General* v. *Delaney* (4).

BARRY, L.J., concurred in the judgment of the Court.

(1) 1 Phil. 290.
(2) 1 Moll. 616.
(3) 34 Ch. D. 438.
(4) I. R. 10 C. L. 104.

WALKER, L.J.:—

It was not suggested by Counsel for the Crown that the contention on behalf of the Inland Revenue authorities was aided by the special language used in the 38th section of the 5 & 6 Vict. c. 32, "or for any purpose merely charitable." In other words, the only question which we have been called upon to decide is, whether the bequests in question are bequests for "charitable purposes," as those words have been interpreted by analogy to or under the Statutes 43 Eliz. c. 4 (Eng.) and 10 Car. sess. 3, c. 1 (Ir.).

Another concession on which the argument proceeded was, that in Ireland at all events, a bequest to have Masses said for the soul of the testator is not void or against the policy of the law as being for a superstitious use, and to that extent the authority of *The Commissioners of Charitable Donations and Bequests* v. *Walsh* (1), was admitted: but it was denied that the bequests for Masses there given by the will of Judith Rush had been decided by Lord Manners to be charitable gifts. My own opinion is that the decree of Lord Manners is framed on the assumption that the bequests were not only legal but charitable, and were to be applied as such, but till lately the case was not dealt with as deciding that point, and speaking for myself I think this Court is able to consider the question without being embarrassed by any idea that a decision in favour of the Crown would disturb what had been as well solemnly decided in 1823, as since acknowledged. To that extent only can (I think) the authority of Lord Manners' decision be discounted.

The next material consideration is, whether a bequest for the celebration of Masses in public in a church in Ireland is a valid charitable bequest. The Solicitor-General admitted that it was, and the Attorney-General did not assert the contrary. I cannot think that there is any doubt upon this point. The matter is so admirably stated by the Master of the Rolls, in *Perry* v. *Tuomey* (2), that I adopt his language (at p. 486 of the Report) in preference to any I could use. He says: "Now, had the bequest been for the public celebration of the Mass in a church in Ireland (without more), I conceive that there cannot be much doubt that it would have been charitable. It would have been simply a provision for

(1) 7 Ir. Eq. R. 34 *n*. (2) 21 L. R. Ir. 480.

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the celebration of the most solemn and important portion of the public worship of the Roman Catholic Church; and as there can, now-a-days, be no suggestion of illegality in that, nor any objection on the ground of superstitious use, and as, since the Irish Church Act, all religious distinctions have been done away with, in the eye of the law, at least, for any purpose which can be material to the present inquiry, the legacy would have been on the same footing as one for the endowment of public worship after the order of the Protestant Episcopal or Presbyterian Church. There can be no distinction arising from the nature of the Mass as a sacrifice by the priest. It is performed, in public, for the spiritual benefit of all the congregation."

But the way in which, as I understand the argument was presented for the Crown, was—(*a*) that when a testator gives a legacy for Masses, to be solemnized in public, for the repose of the soul of himself or other named deceased persons, the purpose of the bequest, as distinct from its motive is a private benefit which pervades the whole gift, and deprives it of a public or charitable character; (*b*) that a bequest of this kind may, on the evidence be satisfied by a Mass which is celebrated in pursuance of some other direction, or by any other Mass non-parochial, and therefore that there was no necessary addition to the sum of public religious celebrations; and (*c*) that, on the evidence, the bequest would be satisfied by the priest celebrating the Mass, with an intention, but not in any way expressed, that it should be offered for the souls of the persons designated by the testator, and therefore that the Court of Chancery had no means of compelling the carrying out of the charitable gift, and that it was, consequently, indefinite within the meaning of the cases of which *Morice* v. *Bishop of Durham* (1) may be cited as an instance.

As to the first of those objections, the Attorney-General disclaimed the idea of determining the charitable character of the purpose by the motive of the giver. To do so would invalidate a large proportion of charitable gifts, but I think the idea which he disclaims follows his contention when rightly understood. It is in the form of the gift, and its direct or indirect results, that the

(1) 10 Ves. 522.

purpose must be found, as Vice-Chancellor Wickens says, in *Cocks* v. *Manners* (1) :—" Religious purposes are charitable, but that can only be true as to religious services tending directly or indirectly towards the instruction or the edification of the public." Every Mass includes a solemn prayer for the dead, as well as for the living, and every public Mass is celebrated in the presence of hearers, who believe in the efficacy of prayers for the dead—as a part of the whole which is edifying and instructive. Prayers for named sick persons, and thanksgiving for named convalescent persons, constantly form a part of the public service of the Irish Church, and are a part of an edifying whole, so, prayers for named dead, when added, cannot alter the public religious character of the Mass, which always includes as an edifying part, prayers for all faithful dead. It seems to me, therefore, that once we are driven to reject the motive of the giver as a factor in the case, the character of the Mass, whether it does or does not include the prayer in question, alone remains, and it must determine the validity of the gifts.

The next objection was that there was not necessarily any addition to the number of Masses celebrated, and therefore that no public religious purpose was served or attained. But I do not think if there be a gift, say for the preaching of God's Word, or for the maintenance of services in a church, that the Court goes into the question of the number of services performed, and weighs the extent of benefit in fact conferred. The tendency of such a gift, having regard to the character of the thing served, is to promote a charitable purpose. It creates a fund for its endowment. Further, if according to the doctrines of the Roman Catholic Church one Mass may answer the purpose of a direction by two testators to have Masses said if the names of the persons specified by both testators are included, there is still an endowment for the object in the manner prescribed by the doctrines of the Church and the intent of the donor.

The last objection is the alleged impossibility of enforcing the charitable bequest as the Court cannot reach an intent unexpressed. I do not think this objection raises any difficulty. The testator was a Roman Catholic and knew the doctrines of his Church and

(1) L. R. 12 Eq. at p. 585.

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the mode in which according to these doctrines the bequest would be carried out. He trusted the priest. A bequest for such religious purposes as the trustees of the will should think fit is a good charitable bequest: *Baker* v. *Sutton* (1), and *Townsend* v. *Carus* (2). *The Commissioners of Charitable Donations and Bequests* v. *Walsh* (3), and *Powerscourt* v. *Powerscourt* (4), are notable instances. In such cases the Court pays the money to the person whom the testator invested with the discretion and duty, coupling the payment with directions as prescribed by the donor. There is no scheme settled. This eminently applies to a case like the present, for the gift is in effect a direction to say Masses in the manner in which according to the doctrines of the Roman Catholic Church Masses are said, and such variances in the manner of celebrating them as exist are within the discretion of the priest by virtue of his office, and he is given control over them. The case is not like such a one as *Morice* v. *Bishop of Durham* (5), where the vagueness of the bequest consisted in the possibility of its devotion, on the language used, to purposes not charitable by reason of words such as "benevolent" or "liberal," or the like being associated with "charitable," and thus creating a trust which was not necessarily charitable. A discretionary manner of executing a charity is quite a different thing from a discretion to include purposes which are not charitable though they may be good.

Further, I do not admit that the Court cannot see to or enforce the carrying out of the donor's intentions. The direction which accompanies the payment out of Court implies that it does and can in the only practical way. The Court could supply a remedy for a proved violation of the obligations, and, if necessary, by examination acquire knowledge whether it had been carried out in fact.

In my opinion the objections to the bequests fail, and they must be held to be charitable, and therefore within the exemption from duty.

Solicitor for the appellant: *The Solicitor of Inland Revenue.*
Solicitor for the respondent: *D. Purcell.* G. Y. D.

(1) 1 Keen, 232. (2) 3 Hare, 257. (3) 7 Ir. Eq. R. 34 *n.*
(4) 1 Molloy, 616. (5) 10 Ves. 522.

FARRELLY *v.* LYNCH (1).

(1896. No. 5520.)

Q. B. Div. 1897. Feb. 6.

Sheriff—Fees on execution—Liability of solicitor—Rules of Supreme Court, 1893—Order LXV., Rule 90.

A solicitor who issues a writ of *fieri facias* and hands it to the sheriff becomes, on the execution or return of the writ, personally liable to pay the sheriff the fees prescribed in the schedule contained in Appendix S, Part iv., of the Rules of the Supreme Court, 1893.

MOTION by the solicitor for the defendant, who had recovered judgment for costs and issued a writ of *fieri facias* thereon against the plaintiff, seeking to discharge so much of an order made at Chambers by Mr. Justice Gibson, as declared that the sheriff's fees awarded for the execution of the writ should be paid by the solicitor personally.

The defendant had recovered judgment against the plaintiff Thomas J. Farrelly for the sum of £37 2*s.* 7*d.*, costs payable to him by the plaintiff. William J. Girvan, the defendant's solicitor, thereupon issued and handed to the sheriff a writ of *fieri facias* directing him to levy the said sum, and sheriff's fees, off the plaintiff's goods. The sheriff caused a horse and car to be seized under the writ. A claim to the goods seized was made by a man called John Farrelly, and the sheriff obtained a summoning order. By consent the question as to the property in the goods was tried and determined on the hearing of the interpleader summons before Mr. Justice Gibson on January 29th, 1897. Witnesses, including the claimant and the plaintiff, were examined before the learned Judge, and an affidavit sworn by Lorcan G. Sherlock, manager of the under-sheriff's office in the city of Dublin, and made for the purpose of obtaining the interpleader order, formed part of the evidence produced. This affidavit referred to the writ

(1) Before O'BRIEN, JOHNSON, and HOLMES, JJ.

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of *fieri facias*, and stated that, "on the 14th day of January, 1897, the sheriff caused to be seized one mare, car No. 61, and harness, which were pointed out to sheriff's bailiffs by defendant's solicitor, W. J. Girvan, immediately before seizure, as the property of the plaintiff, Thomas J. Farrelly." The affidavit then referred to the claim made by John Farrelly, stated that notice of the claim was given to Mr. Girvan, who gave notice that he disputed the claim so made. The affidavit concluded with the averment that the sheriff claimed no interest in the subject matter in dispute other than for charges and poundage, denying collusion and submitting to the jurisdiction of the Court.

At the conclusion of the evidence, having heard counsel for the sheriff, the claimant, and the executor's creditor, Mr. Justice Gibson found that the goods seized by the sheriff under the writ of *fieri facias* were at the time of such seizure the property of the claimant, and accordingly ordered that the sheriff should withdraw from the possession of the said goods, and that the execution creditor should pay to the claimant and to the sheriff their costs in the matter (measured at £5 5*s.* and £3 3*s.* respectively), and further ordered that the sheriff be declared entitled to the sum of £3 16*s.*, his expenses in keeping said goods, said sum, on the application of the sheriff, to be recovered and recoverable against Mr. W. J. Girvan, the solicitor for the execution creditor personally.

Henry, Q.C., and *Gaussen*, for Mr. Girvan:—

The sheriff at Common Law was entitled to no fees or remuneration. By statutes (10 Chas. 1, sess. 3, c. 19, and 6 Anne, c. 7) the sheriff was given poundage on the amount recovered; and by the Rules of 1885, Order III., the sheriff was first given fees for executing writs. These fees were payable by the party at whose instance the sheriff was required to execute the writ, Order III., Rule 2, and might be levied by the sheriff with his poundage. Nothing can be found in any rule prior to those of 1893, under which it can be suggested that the solicitor was liable to pay the sheriff his fees; but there are decisions which show that the solicitor might be held liable to pay the sheriff his fees on an express or

implied promise: *Wallbank* v. *Quaterman* (1); *Foster* v. *Blakelock* (2). It is said, however, that Order LXVI., Rule 90 (of 1893), alters the law in this respect, and in every case makes the solicitor who issues the writ liable to pay the sheriff his fees: this view was adopted by Madden, J., in *Stevenson* v. *Moorehead* (3), and his decision was followed by Mr. Justice Gibson in this case. If the new rule alters the old law so as to create a liability on the solicitor, it is *ultra vires*. The object of the rule was not to alter the liability of the parties; it leaves the law as it stood before; it declares the fees to be payable by the solicitor or party in person, recognising that under certain circumstances the solicitor was liable to pay the fees. The solicitor is only an agent for a disclosed principal: *Ex parte Hartop* (4). Clear words in Rules as well as in Acts of Parliament are required to create new liabilities.

P. A. O'C. White, for the sheriff:—

The rule admits of only one interpretation. It gives the sheriff his fees on the return of the writ, and declares that he may recover them either from the solicitor who issues the writ or the party in person. *Stevenson* v. *Moorehead* (3) is expressly in point. The sheriff need not issue the writ unless he be indemnified by his client.

O'BRIEN, J.:—

I entertain a view of the case perhaps not altogether identical with that of my colleagues, but I am disposed to think the most convenient course is to affirm the decision of Mr. Justice Gibson. I feel two difficulties in the matter. First, the construction of the rule adopted by the Court obviously alters the position of professional men, and subverts the principles which from the earliest times had regulated the liability of solicitors, and further introduces a state of law different from that which now exists in England, and thus seems to transgress the direction laid down in the sixty-first section of the Judicature Act (Ireland) 1877. Secondly, if the concluding words of the rule are to be read literally, they clearly say that all

(1) 3 C. B. 94.
(2) 5 B. & C. 328.
(3) 30 I. L. T. R. 139.
(4) 12 Ves. 349.

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the fees given in the schedule are to be payable by the solicitor or party in person issuing the writ; and it is hard to reconcile this construction with the direction in the schedule itself that in cases where the execution is withdrawn by the person or persons at whose instance the sheriff is required to execute, the fees are to be payable by such person or persons, and if more than one in equal shares.

However, having regard to the fact that the point has been already decided in the same way by Mr. Justice Madden in *Stevenson* v. *Moorehead* (1), I think the most proper course for this Division to adopt, is to affirm the decision of Mr. Justice Gibson, and to leave it to the solicitor, if he should feel so inclined, to test the question in the Court of Appeal.

JOHNSON, J.:—

I agree with my brother O'Brien as to the desirability of, as far as possible, assimilating the practice in this country to that which prevails in England; but the difficulty in this case arises on the construction of a rule containing provisions which are not to be found in the English rules. I think that the rule before the Court can only admit of one construction. My brother Holmes, during the argument, referred to the endorsement to be placed on the writ by the person who issues it. The prescribed endorsement contemplates the two alternatives mentioned in the rule, viz.: that either the solicitor, or party in person may issue the writ. The rule then says that whichever it be solicitor or party in person who issues the writ is to be the person who is responsible for and should pay the fees. It was said that this interpretation introduces a hardship upon the solicitor. That, however, can easily be avoided, because the solicitor has it in his power to require his client to put him in funds to meet the fees.

HOLMES, J.:—

I am of opinion that the question depends upon the construction of the rule, and I agree with Mr. Justice Johnson that the rule admits of only one construction. During the argument

(1) 30 Ir. L. T. R. 139.

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Holmes, J.

I called attention to the form of the writ, and the direction that it is to be endorsed with the name of the person issuing it. That person can only be one of two, the solicitor or party in person. The rule is based upon that state of things, and its concluding words can only mean that the fees provided for by the earlier part of the rule are to be paid by the person who actually issues the writ, solicitor or party in person as the case may be.

The decision of Mr. Justice Gibson must therefore be affirmed with costs.

A. E. R. J.

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Feb. 25. March 1.

The solicitor appealed to the Court of Appeal (LORD ASHBOURNE, C., FITZ GIBBON AND WALKER, L.JJ.).

Matheson, Q.C., and *Henry, Q.C.* (with them *P. C. Gaussen*), for the appellant:—

Except for rule 90, Order LXV., it cannot be contended that the solicitor would be liable to pay these fees to the sheriff apart from contract express or implied: *Royle* v. *Busby* (1). Rules made under the Judicature Act (section 61), cannot give rights to third parties which did not exist before: *Pellas* v. *Neptune Marine Insurance Company* (2); *Hannay* v. *Smurthwaite* (3); *In re a Solicitor* (4); *Britain* v. *Rossiter* (5); *In re Mills* (6). Therefore if the rule makes a solicitor who issues a writ of execution and hands it to the sheriff liable for the sheriff's fees, it is *ultra vires*. But the Court will endeavour to give the rule a meaning which will not exceed the powers delegated to its framers: *Lapsley* v. *Blee* (7). The rule may without violence to its language be held to ascertain the amount of fees and not to make them payable otherwise than they were by law previously payable.

Wright, Q.C. and *Campbell, Q.C.* (with them *White*), for the respondent:—

The rule admits of only one construction, the solicitor if he

(1) 6 Q. B. D. 171.
(2) 5 C. P. D. 34.
(3) [1893] 2 Q. B. 412.
(4) 25 Q. B. D. 17.
(5) 11 Q. B. D. 123.
(6) 34 Ch. D. 24.
(7) 6 L. R. Ir. 155.

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issues the writ becomes liable to pay the sheriff; the rule is not *ultra vires*, it imposes no new liability; it rests with the solicitor whether he will incur the liability or not; his retainer is discharged by the judgment; he need take no further step, unless he be indemnified by his client; there is no hardship upon him, but there may be upon the sheriff whom he puts in motion; the rule was framed to remove this hardship.

Cur. adv. vult.

March 1. LORD ASHBOURNE, C.:—

This is a case of some importance and interest to sheriffs and solicitors. The question argued before us arises upon the concluding words of rule 90 of Order LXVI. The earlier part of the rule prescribes that sheriffs shall be entitled to the fees in the schedule when concerned in the execution of writs and processes of the Court; and the final sentence of the rule enacts that "such fees shall be payable to the sheriff by the solicitor or party in person issuing the writ upon the execution or return thereof." These words, to which there was no analogue in the previously existing rules, are relied upon by the sheriff as declaring him entitled to have his fees paid by the solicitor, who has issued the writ, personally.

It may be noted that though the rule has been in force since October 25, 1893, no question was raised upon its construction until the year 1896. At the last Summer Assizes at Londonderry, in *Stevenson* v. *Moorehead and Wood*(1), the solicitor's liability under this rule seems to have been discussed, for the first time, before Mr. Justice Madden, upon a civil-bill appeal, and the learned Judge was of opinion that on the construction of the rule he could arrive at no other conclusion than to hold the solicitor liable.

The matter was raised in the present case, on the trial of an interpleader issue, before Mr. Justice Gibson, who without (as I gather) delivering any formal judgment, followed *Stevenson* v. *Moorehead and Wood* (1), and directed that the solicitor who had issued the writ of *fieri facias* should pay the sheriff's fees incurred in the execution. From that order the solicitor appealed to the

(1) 30 Ir. L. T. R. 139.

Divisional Court who affirmed the decision appealed from. We have been furnished with the judgments of the Judges who heard the case in the Queen's Bench Division, from which it appears that Mr. Justice Johnson and Mr. Justice Holmes entirely concurred with the view expressed by Mr Justice Madden, and that Mr. Justice O'Brien, while he pointed out some difficulties which suggested themselves to him arising from the decision of the Court, did not dissent therefrom, but, on the contrary, thought it most expedient to follow the decision of Mr. Justice Madden.

Two points have been argued before us. First, on the construction of the rule, it has been contended that it means no more than if it ran—"such fees shall be payable to the sheriff by the solicitor or party in person, whichever be liable under the previously existing law." But I agree with all the five Judges before whom the matter has come that the rule admits of only one construction. It cannot be construed in accordance with the appellant's contention without doing violence to the language in which it is drawn. Indeed, counsel for the appellant admitted that, grammatically, the rule must be construed against the view for which they contended, but they argued that the Court would strive to give a non-natural meaning to a rule rather than hold it *ultra vires;* and this branch of their argument led up to the second ground on which they sought to impeach the decision appealed from, viz. that, if the rule makes the solicitor, who merely issues the writ and hands it to the sheriff, liable personally to pay the sheriff's fees, the rule is *ultra vires.*

Of course, in framing rules, the Judges are bound by the limits of the statutory authority with which they are invested, and any rule which exceeds those limits must be treated as a nullity. But having carefully weighed the able argument which was addressed to us, and having fully considered the section under which these rules were framed, the previously existing law, and the rule that has been called in question, I am unable to see that the scope of this rule exceeds the powers which the Legislature has conferred upon the Judges.

Under the previously existing law the solicitor became liable to pay the sheriff's fees in executions, where he had done anything in putting the sheriff in motion from which the Court could imply

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a contract between the sheriff and the solicitor that the latter would be responsible to the former for these fees. Curiously enough, the facts of the present case, though not referred to during the argument, would under the previous law suffice to make the solicitor liable. It is stated in one of the affidavits filed for the purpose of obtaining the interpleader order, that "on January 14, 1897, the sheriff caused to be seized one mare, car, and harness, which were pointed out to the sheriff's bailiffs by defendant's solicitor, W. J. Girvan, immediately before seizure, as the property of the plaintiff." Thus, in the present case, we have the solicitor not only sending the writ to the sheriff's office, but going to point out what was to be seized in execution. Where the solicitor takes such an active part in carrying out the execution, his conduct renders him liable to pay the sheriff's fees independently of this rule.

But I do not wish to avoid deciding the issue raised during the argument: and I have no hesitation in holding that it was within the powers of the Judges to make the rule in question. It is to be borne in mind that there is nothing in this rule which makes it in any wise compulsory or obligatory on the solicitor to issue the writ of execution. His retainer is at an end when he recovers judgment. It is a purely voluntary act on his part to issue the writ and hand it to the sheriff. Before he takes this step he can satisfy himself that his client is a solvent person—able to indemnify him from the liability incurred by putting the sheriff in motion. I cannot but think, therefore, that the practical importance of the change introduced by the rule has been overstated. It appears to me that, once the meaning of the rule is known and understood, no point can arise upon it except in a case where both plaintiff and defendant are insolvent. If the execution is fruitful, the sheriff can levy his fees against the execution debtor. If there are no goods to satisfy the writ, the solicitor who has issued it on paying the sheriff for his services can look to his client for the amount, and can recover it if his client is solvent.

I admit that a solicitor may sometimes have undertaken a case for a client who is not a person of large means. But every solicitor must know the resources of his own client, and when he has recovered judgment and so determined his own retainer, he is

in a position to judge for himself what he will do, before he decides on taking the further step of issuing execution. He can ascertain whether his client can indemnify him. If he thinks his client is not in a position to recoup him for his outlay in respect of the sheriff's fees, he can stay his hand, and so avoid all risk of liability. To issue execution is on his part a purely voluntary act. Thus it will be seen that the rule imposes on the solicitor no obligation or liability which he cannot avoid. It makes no change in the rights of parties, and cannot be treated as *ultra vires*.

I am of opinion that the contention of the appellant cannot be sustained either as to the construction or as to the validity of the rule, and the appeal must be dismissed with costs.

FITZ GIBBON, L. J.:—

The order appealed from does not show whether it was made on the construction of the rule, or upon the special facts of the case. But the affidavit to which it refers states circumstances which would render the solicitor personally liable to pay the sheriff's expenses, even if the rule had never been made. The affidavit states that the solicitor, Mr. Girvan, himself pointed out to the sheriff the property to be seized. He thereby made himself personally liable to the sheriff for the fees and expenses of the execution, and also to the owner of the property, if, instead of an interpleader proceeding, this had been an action for wrongful seizure.

I recognise no power in this Court, on the consent of parties, to reverse a decision on hypothetical grounds, where the real facts are disclosed upon the evidence, and show the decision to be right. To recognise such a power would enable parties to obtain decisions which might affect others, or at least might be applied in other cases, without having the question discussed by those who really had any right or interest in the matter. It must, therefore, so far as I am concerned, be distinctly understood that the omission of counsel on both sides to discuss Mr. Girvan's personal liability, on the ground of conduct, does not entitle him to limit the question of his liability to the bare construction or validity of the rule, or to treat this as a "test case" upon that point.

However, I have no objection to answer the only question

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which was argued, and to say that, in my judgment, the opinion of the majority of the Judges in the Queen's Bench Division was right, and that the doubts expressed by O'Brien, J., do not appear to be well founded.

As a matter of construction, it is impossible to escape the conclusion that the framers of the rule intended that the sheriff should be enabled, by looking at the back of the writ, to see who was to be answerable to him for his fees and expenses. The prescribed endorsement shows the name of the solicitor, whenever the writ is issued by a solicitor, and the name of the party, whenever it is sued out in person.

When it is said that this construction imposes a new and unreasonable liability on solicitors, and is therefore *ultra vires*, I cannot but think that this is an exaggeration of the effect of the rule. It regulates procedure; it prescribes a form of endorsement; it deals with the mode of securing his outlay and fees to the sheriff, as an officer of the Court, for performing his duty in executing the writ.

In most cases, notably in the present instance, the solicitor makes himself personally liable by active interference, and the rule makes that liability general, if the solicitor issues the writ. If he is unwilling to undertake it, the solicitor need not issue the writ, nor call on the sheriff to incur expense in executing it. The rule puts no liability upon the solicitor different in kind from that which he takes upon himself in other matters involving outlay. In such matters the solicitor, where his client is not a mark, speculates on being recouped by the opposite party. It seems unreasonable that the sheriff, who is a public officer, should suffer, if a solicitor chooses to put him to trouble and expense for a party who cannot pay. The solicitor can protect himself, or do nothing. The sheriff cannot protect himself; and when the writ is handed to him, he must execute it, if possible. I think the effect of the rule is merely to make the liability normal, which was formerly only usual, where the solicitor elects to issue the writ.

WALKER, L.J.:—

Order LXVI., R. 90, for obvious purposes of convenience, departed from the language of the rule of 1885, and makes the

solicitor the paymaster, in the first instance, to the public officer as between himself and his client, when he takes upon himself the duty of issuing the writ.

As to Mr. Matheson's first contention, it is opposed to the plain language of the rule, and I pass by that point. Secondly, he contended, that the rule was *ultra vires* Our rules are made by the Lord Lieutenant in Council, on the responsibility of the Lord Chancellor and Judges. I concur entirely, if I may respectfully say so, in observations made by Lord Esher, in the case of *Ex parte Foreman; In Re Hann* (1), where the question was, whether certain rules, made under an Act of Parliament, by the Lord Chancellor and President of the Board of Trade, were *ultra vires*. He says, "I will only add, that whenever the objection is taken that a general rule, made by such a great judicial officer, with the concurrence of a great officer of State, is *ultra vires*, it will be necessary for the Court, if it has to decide the point, to look at the rule with extreme care, and we should be strongly inclined to the view that such high functionaries had not exceeded their authority, though, of course, if we thought they had, we should be bound to say so."

When the rule in question here came to be made, the client, the disclosed principal, was in all cases liable to the sheriff for his fees, and the solicitor, the agent, was personally liable or not, according as he personally and specially identified himself with the execution. He did not become personally liable from the mere fact of delivering the writ to the sheriff. Under the Judicature Act the power is to make rules—I read its language—for "regulating any matters relating to the fees to be payable to or receivable by sheriffs for the discharge of any duties under this Act."

The rule does not profess to remove the liability of the client to the solicitor when he makes the payment for him. It only makes the solicitor the immediate hand to pay, when he chooses, for profit to himself, to put the sheriff in motion for his client. It is a mere question of order of payment, and it will be no greater hardship for the solicitor to incur this expense at the last stage of the litigation than as he does in numerous other preceding

(1) 18 Q. B. D. at p. 400.

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stages of the action, when he choses to act and pay, taking care to be protected and indemnified by his client. *Volenti non fit injuria.* The condition for immunity is in his own hands.

In the case of *Ex parte Foreman* (1), to which I have already referred, the question was, whether under a power to make rules in Bankruptcy, one could be made that no appeal should be brought to the Court of Appeal from a County Court, when the property involved did not exceed £50, unless by leave of the Court. The Act had provided that an appeal should lie, but should not be entertained except in conformity with such general rules as might be for the time being in force in relation to the appeal. The Court held that the rule was *intra vires*, but Bowen, L.J., puts the argument for the appellant thus: "It is said, that while the rules may well impose on an appellant a condition with which it is in his power to comply, it would be going beyond the authority given to frame rules to impose a condition with which it is not in the appellant's own power to comply."

Applying even that test, the solicitor holds in his own hands the condition of immunity. He need not act till he is fully indemnified by his client. Independent of that, I think the rule does no more than regulate the matter relating to the fees payable to the sheriff, for it says, in effect, that the solicitor, the officer of the Court, who puts the sheriff, the public officer, in motion, shall, as between him and his client be the first hand to pay. It is a convenient provision, just as it would be to make him liable for the Court stamp if he chooses to ask for it, and I cannot see what real hardship the rule imposes—a hardship now discovered after several years working of it.

Solicitor for the appellant: *The appellant in person.*
Solicitor for the sheriff: *Gerald Byrne.*

G. Y. D.

(1) 18 Q. B. D. 393.

COPE, LANDLORD; CUNNINGHAM, TENANT (1).

Appeal. 1897. Feb. 1.

Court fixing fair rent—Schedule—Land Commission—Land Law (Ireland) Act, 1896, section 1.

The Land Commission, on rehearing a case from the Sub-Commission, is bound to ascertain and record, in form of a schedule, the matters mentioned in section 1 of the Land Law (Ireland) Act, 1896.

CASE STATED by the Land Commission.

The tenant, on the 24th March, 1896, served an originating notice of an application to the Land Commission, to fix the fair rent of his holding, payable during a statutory term. The application came on for hearing before a Sub-Commission, duly constituted under the powers conferred on the Land Commission, by sect. 43 of the Land Law (Ireland) Act, 1881, to which Sub-Commission power had been delegated by the Land Commission, to hear, decide, and make orders in cases under the Land Law (Ireland) Acts, 1881 and 1887; and an order was made by the Sub-Commission, on the 23rd June, 1896, fixing and determining that the fair rent of the said holding was the annual sum of £2 12*s.* 6*d.*

The landlord being dissatisfied with the said order duly served a notice in pursuance of sect. 14 of the Land Law (Ireland) Act, 1881, requiring his case to be reheard before three Commissioners sitting together, and the case came on for rehearing before the Land Commission, at Armagh, on November 4th, 1896.

On the rehearing, an application was made to the Land Commission, on behalf of the landlord, to ascertain and record in the form of a schedule the several matters and things mentioned in sub-sect. 1 of sect. 1 of the Land Law (Ireland) Act, 1896, but the Land Commission refused to do so on the ground that sub-sect. 1 of sect. 1 of the said Act did not apply to the present case.

(1) Before LORD ASHBOURNE, C., PALLES, C.B., and FITZ GIBBON, BARRY, and WALKER, L.JJ.

Appeal. 1897. COPE, *Landlord*; CUNNINGHAM *Tenant.*

The Land Commission considered the word "Court" in sub-sect. 2 of sect. 3 of the said Act applied exclusively to the Court, whether Civil Bill Court, Sub-Commission, or Land Commission, by whom a judicial rent is fixed in the first instance, and not to the Land Commission, when hearing appeals from the Civil Bill Courts, or rehearing cases heard by a Sub-Commission, and that where the Land Commission on such appeal or rehearing affirms or varies the judicial rent it does not fix a judicial rent within the meaning of this sub-section. The Land Commission were also of opinion, both from the similarity of the language in the two sub-sections, and from the nature of the subject-matter of sub-sect. 1 of sect. 1 of the said Act, that the word "Court" in the last-mentioned sub-section must be construed in the same manner as in sub-sect. 2 of sect. 3, and that the schedule therein mentioned is to be prepared by the Court, by whom a judicial rent is fixed in the first instance. If such a schedule had not been prepared by the Civil Bill Court or the Sub-Commission, as the case may be, the Land Commission on an appeal or rehearing would rarely have the materials to enable it to ascertain and record the matters dealt with by the schedule. It appeared to the Land Commission that the judicial rent in this case payable during the second statutory term had been fixed by the Sub-Commission prior to the passing of the Land Law (Ireland) Act, 1896, that the second statutory term had commenced to run from the 1st November, 1896, and that even though the Land Commission had varied this judicial rent so fixed by the Sub-Commission, the Land Commission did not fix the judicial rent for the holding within the meaning of sub-sect. 1 of sect. 1 of the said Act (1).

The question stated was, whether under the circumstances stated in the foregoing case the Land Commission were bound to ascertain and record in the form of a schedule the several matters mentioned in sub-sect. 1 of sect. 1 of the Land Law (Ir.) Act, 1896?

Campbell, Q.C., and *H. A. Johnston*, for the landlord:—

A re-hearing before the Land Commission is not an appeal: *Adams* v. *Dunscath* (2), *Kieran* v. *Caruth*, and *Lewis* v. *Darn-*

(1) See judgment of Bewley, J., reported 31 Ir. L. T. R. 12. (2) 10 L. R. Ir. 136.

ley (1), *Conyngham* v. *Gallagher* (2). On a rehearing the order is that of the Land Commission.

LORD ASHBOURNE, C.:—

This case comes before the Court on a case stated by the Land Commission, and it raises a very important question on the construction and intention of sect. 1 of the Land Law Act of 1896. The case stated by the Land Commission states that the tenant on the 24th March, 1896, served an originating notice to fix a fair rent of his holding. The application came on for hearing before a Sub-Commission duly constituted under the powers conferred on the Land Commission by sect. 43 of the Land Law Act, 1881, and an order was made by the Sub-Commission on the 23rd June, 1896, fixing the fair rent of the holding. The landlord being dissatisfied with the order served a notice requiring his case to be reheard, and the case came on before the Land Commission, at Armagh, on the 4th November, 1896. The case then states:— "On the rehearing an application was made to us on behalf of the landlord that we should ascertain and record in the form of a schedule the several matters and things mentioned in sub-sect. 1 of sect. 1 of the Land Law (Ireland) Act, 1896, but we refused to do so on the ground that sub-sect. 1 of sect. 1 did not apply to the present case." The question we have to decide is whether that conclusion of the Land Commission is correct, and whether the refusal to fill up a schedule under sect. 1 is valid.

Mr. Justice Bewley founded his opinion somewhat on the words of sub-sect. 2 of sect. 3, and held that the word "Court" in that sub-section applied exclusively to the Court of the Sub-Commission, or the County Court, or the Land Commission, by whom a judicial rent was fixed in the first instance, and not to the Land Commission when hearing appeals, and therefore must have that meaning in sect. 1. I am not impressed by that argument, because I regard the governing words of that sub-sect. 2 as the words which provide that the judicial rent shall begin from the gale day next after the date of the application to fix a fair rent. But the decision of the Land Commission proceeds on the

(1) 19 Ir. L. T. R. 1. (2) 22 L. R. Ir. 614.

Appeal. 1897. COPE, *Landlord;* CUNNINGHAM *Tenant.* Lord Ashbourne, C.

broad ground that the Court of the Land Commission, when rehearing cases, is not to be regarded as bound by the obligations in sub-sect. 1 of sect. 1 of the Act of 1896. I am unable to follow that contention. Sub-sect. 1 commences with words of the clearest character:—"Where the Court fix a fair rent for a holding, the Court shall ascertain and record in the form of a schedule, unless both landlord and tenant shall otherwise request." Then follows a series of heads from (*a*) to (*g*) stating what the contents of the schedule should be. I pause to ask—where the words are, "where the Court fix a fair rent for a holding," must not that comprise all the tribunals called upon to hear or rehear the case? It would clearly apply to the Sub-Commission. But when the case comes up to be reheard by the Land Commission, what are its functions and duties? If it is to rehear, is it not for the purpose of determining for itself the fair rent of the holding? and is it not the Court which does fix the fair rent? I am of opinion that it is, and, if that be so, the Land Commission must discharge the duty contended for, whether it is difficult or easy.

There are some cases which have been referred to. In *Adams* v. *Dunseath* (1) it was laid down distinctly in more judgments than one that the function and duty of the Land Commission were to rehear the case. The meaning of "fixing" the rent came before the Lord Chief Baron in *Conyngham* v. *Gallagher* (2), and the same meaning was there put upon it as is now contended for.

I am of opinion that there is no room for any discretion in the present case. I regard the provisions of this section as mandatory. The section says:—"The Court shall ascertain and record in the form of a schedule." It is impossible to have more clear and precise words, and then it goes on—"unless both landlord and tenant shall otherwise request." That shows that it must be done unless both parties request otherwise, and the closing words of the section are—"A certified copy of the record shall on the prescribed application be sent by post to each party, and the record shall be admissible in evidence on its mere production from the

(1) 10 L. R. Ir. 136. (2) 22 L. R. Ir. 614.

proper custody." I regard that as further proof of the necessity of complying with this section, and that the parties have a right to see that the section is complied with.

The rest of the section to some extent deals with other topics, but sub-sect. 9 is of some importance. It provides that "in assessing the fair rent of any holding no deduction shall be made, except such deductions as shall be specified and accounted for in the said schedule, and are in accordance with the provisions of the Land Law Acts."

In every way it is clear that this was regarded as a matter of importance, that was laid down with precision by the Act of Parliament, and must be complied with. For these reasons I am of opinion that the question asked must be answered in the affirmative.

PALLES, C. B.:—

I concur. The effect of the decisions of this Court in *Kieran* v. *Caruth*, and *Lewis* v. *Darnley* (1) is to determine (that which, even without such decisions, would have been abundantly clear), that when the Land Commission, upon the rehearing of an application previously heard by a Sub-Commission, either affirms a decision of the Sub-Commission fixing the rent, or varies it only by altering the amount of the rent, the fair rent is, upon the true construction of the Act, fixed by the Land Commission, and not by the Sub-Commission. Hence it follows that in every case in which the Land Commission determines the amount of a fair rent, either by its simple affirmance of a previous order of the Sub-Commission, by a variation of such order as to amount, or by reversing an order dismissing the tenant's application, and determining the rent, the Land Commission is "the Court," within the meaning of section 1, sub-section 1, of the Act of 1896.

I have further to add that I think it is clear, upon the frame of this sub-section, that the intention of the Legislature was that the Court should, before it determines, and as incidental to determining, the amount of the fair rent, ascertain the various particulars mentioned in clauses (*a*) to (*f*) of the sub-section;

(1) 19 Ir. L. T. R. 1.

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and that the fair rent of the holding should be ascertained, having regard to such particulars, which are essential ingredients in, and the basis of, the ascertainment of the fair rent. It is impossible that there can be any difficulty in recording them, if the rent has been fixed in pursuance of the directions of the sub-section. The rent cannot be ascertained, without each of those particulars being present to, and operating upon, the mind of the Court in ascertaining it; and for this reason, I am of opinion that the omission of the schedule is not a mere irregularity, but that it goes to the jurisdiction of the Court to ascertain the fair rent of the holding; and in my opinion an order purporting to fix a fair rent, in a case in which the required particulars are not recorded in a schedule, is null and void, and made without jurisdiction.

FITZ GIBBON, L.J.:—

I concur. In my opinion sect. 1, sub-sect. (1) imposes a double duty on the Court which fixes a fair rent, and (unless both parties otherwise request) the jurisdiction to fix the rent cannot be lawfully exercised by that Court, however constituted, without performing that duty.

The Court must first "*ascertain*," and must then "*record in the form of a schedule*," all the matters enumerated under the heads (*a*) to (*g*). The prescribed particulars must be ascertained as factors of the rent, and must be recorded so as to be available for use on any occasion when it may be material to ascertain how the amount of the rent was ascertained. A reference to the specified particulars shows the object of requiring them to be ascertained and recorded. They are (I.) the sum which would be the fair rent on the assumption that all the improvements were the landlord's; in other words, the fair rent of the holding as it stands; (II.) the condition of the holding and buildings thereon; (III.) the tenant's improvements, with special particulars as to each such improvement, including a significant figure showing "*the deduction from the rent made on account thereof.*" This deduction must be judicially made by the Court. (IV.) the extent (if any) to which the landlord has paid or compensated the tenant in respect of each of his improvements; (V.) the landlord's improvements; (VI.)—a

clause which, in my view, demonstrates the mandatory character of the whole section—"such other matters . . . as may have been *taken into account in fixing the fair rent* . . . and, lastly—the result —(VII.) "the fair rent of the holding." I hold this to be a plain enactment that the Court which exercises the jurisdiction to fix the rent must ascertain that rent by the process indicated by the particulars which it is ordered to record. It must ascertain, and take into account, each and every of the matters and figures which result in the rent, and it must record each step of the process by which it has reached the result. If the Court—not of first instance, but which first considers the case—is bound to ascertain all these matters, as the basis of an inchoate or provisional estimate of the rent, why should the final Court—the Land Commission—be exempt from the duty of being equally careful, and of recording its *modus operandi* with the same particularity? It is this consideration which gives vital importance to the Lord Chief Baron's opinion, which I also fully entertain, that compliance with the section is *essential to the jurisdiction* of the Land Commission to fix a fair rent at all.

Sub-sections (5) and (9), read in connection with sub-sect. (1) (*c*) iii., put the meaning of "the Court" beyond doubt, as necessarily including the Land Commission. Sub-sect. (5) enacts ". . . a tenant shall not be deemed to have been paid or compensated for any improvement not made in pursuance of a contract entered into for valuable consideration, except to the extent to which *the Court*, having regard to all the circumstances of the case, are of opinion that valuable consideration has been given by the landlord in respect of the improvement." Then sub-sect. 9 enacts—"*In assessing the fair rent . . . no deduction* shall be made *except* such deductions as shall be *specified and accounted for in the Schedule* . . ." The construction which exempts the Land Commission from the duty to ascertain the prescribed particulars before assessing the fair rent, would render these provisions unworkable. Suppose that a Sub-Commission had allowed, or had disallowed, the claim of a tenant, or of a landlord, in respect of an improvement, and that a notice for rehearing had been served, and the Land Commission came to an opposite conclusion as to the improvement, and consequently fixed the fair rent at a different

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figure, it would be impossible to obey sub-sect. (9) if the Land Commission did not prepare a schedule specifying and accounting for the deductions which it, as "*the Court*" under sub-sect. (5), had made "in assessing the fair rent" under sub-sect. (1) (*c*) iii., and if deductions made on a rehearing must be ascertained and recorded by the Land Commission, it must equally ascertain and record all the other factors of "the fair rent of the holding," which it asseses as the conclusion of the whole matter. In the case which I have put, the record made by the Sub-Commission, or by the County Court, would be wrong, and the Land Commission must show how the rent, altered on rehearing, was arrived at. I mention that case only as an instance in which section 1 must apply to the Land Commission, and if a certain process must be gone through where the action of the Sub-Commission is varied, must not the Land Commission go through the same process when it—under identical judicial obligations—agrees in result with the Sub-Commission?

The essential difference between our view and that of the Land Commission, comes out most clearly when Bewley, J., in one place speaks of the County Court, or Sub-Commission, as a "Court of first instance," and in another place states that the schedule is to be prepared by the Court by which a judicial rent is "*fixed in the first instance.*" With all respect, I cannot reconcile these expressions with the decision of this Court in *Kieran* v. *Caruth* (1), and of the Court of Exchequer in *Conyngham* v. *Gallagher* (2), nor with Sir Edward Sullivan's description of a Sub-Commission as a mere delegation of the authority of the Land Commission, which is terminated by the notice of rehearing. In this he sanctioned the opinion which I had expressed in *Adams* v. *Dunseath* (3) that, on every rehearing, the Commissioners themselves must independently exercise their own judgment upon the question of the amount of the rent which they fix as fair. On every rehearing, whether the Land Commission agrees or disagrees with the conclusion of the Sub-Commission, the decision of the Land Commission, and it alone, is the decision in the case, and, whenever a rehearing takes place, the only rent which is "fixed"

(1) 19 Ir. L. T. R. 1. (2) 22 L. R. Ir. 614. (3) 10 L. R. Ir. 199.

at all is that which is fixed by the Land Commission. Every enactment which regulates the fixing of a fair rent, must apply to the Land Commission whenever it discharges that duty, and it must then ascertain all the prescribed matters, and must record them in a schedule of its own.

I may notice two specific points made in the judgment of Bewley, J. He holds that the word "Court" in sect. 1 must be construed in the same way as in sect. 3, sub-sect. 2, and he seems to think that in the latter section it does not mean the Land Commission. I cannot follow this. "Where *the Court* on application fix a judicial rent . . . the judicial rent and statutory term shall begin from the gale day next after the date of the application." The application is made by the originating notice, and whether the case is or is not delegated to a Sub-Commission, and is or is not reheard, "the Court" means the tribunal which effectively fixes the judicial rent. Sect. 3, sub-sect. 2, makes that rent to run from a date ascertained by reference to the application, and whether there is a rehearing or not, that date is the same.

The other argument rests on the reference in the First Schedule to the Legal and Lay Assistant Commissioners. But sect. 1, sub-sect. (2), enacts that nothing contained in the Schedule shall affect the construction of any other portion of the Act, and even without this provision, the Land Commission could not, by virtue of this form, decline to fix rents, if, as might occur, cases came before it without ever going to a Sub-Commission. If there be any practical inconvenience in obeying the Act, this inconvenience is due to the enactment that rents shall not be fixed as fair unless and until the prescribed materials have been obtained from which the fair rent is to be computed. If the Land Commission, under its *existing* practice, has been assessing rents without ascertaining those materials, this Act provides that this practice shall cease. Parliament has said that henceforth no rent shall be fixed as fair until the fixing tribunal has taken the trouble, and performed the duty, of judicially ascertaining the amount of that rent by a process of calculation based on definite materials, which are capable of being specifically recorded, and which must be so recorded, unless both parties otherwise request.

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BARRY, L.J. (1) :—

I have little to add. I do not quite agree that there will not be practical inconveniences in working out this section. But at the same time I cannot give any other meaning to the words—"where the Court fix a fair rent for a holding"—but that they point to the Court whose decision finally ascertains the rent. We have been referred to several decisions which determine that a rehearing before the Land Commission is a rehearing and not an appeal, and therefore it has relation back to the initiation of the proceedings. If there is a rehearing, the delegation of authority is superseded.

There is some fallacy in the language used by Bewley, J., in saying that the Sub-Commission is a Court of first instance; it is not a Court of first instance; it is a tribunal furnished with some powers to hear cases whose decision will be final unless challenged, and that erroneous language is really at the root of the error at which the Land Commission have arrived. I agree in the conclusion arrived at by the other members of the Court, and though I am not satisfied that a good deal of inconvenience may not arise at the beginning, these difficulties will be smoothed down, I have no doubt, in the course of time.

WALKER, L.J. :—

I concur with the other members of the Court. I have no doubt myself, on the construction of this section, which says—"where the Court fix a fair rent for a holding"—that the Land Commission, where there is an appeal or rehearing, is pre-eminently the Court which fixes the fair rent. Suppose the Land Commission vary the rent fixed by the Sub-Commission, is it not they that fix the rent? Again, they may affirm in result, though they vary substantially, figures on each side of the account in respect of improvements or some other head of claim or defence. The Land Commission is the tribunal which properly corresponds with the description of "The Court." The Sub-Commission is only

(1) These notes were not revised by the late Lord Justice.—[REP.]

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the Court by delegation, and when the case comes to a rehearing the Land Commission becomes the Court once more, and as such it is bound to ascertain and record the various matters mentioned in the sub-headings of section 1, leading up to (*g*) "the fair rent of the holding," as the result of what is stated in the schedule. The schedule is intended to be evidence for all time, and both landlord and tenant may get a certified copy of it. Is it to be said that that record, though every statement in it may have been altered on the rehearing, is to be left in its original state, and so be not only a blind guide, but a misleading and false one? I am sensible of the difficulties mentioned by Bewley, J., in "The Court" carrying out the provisions of the section, but I think its provisions are clear and imperative, and that no option is left to the tribunal, save to comply with it.

Solicitor for the appellant: *Harris.*

R. D. M.

EARL OF MEATH, TENANT; MEGAN, LANDLORD (1).

Appeal. 1897.

Feb. 3, 4,

Landlord and tenant—Tenancy from year to year, on the expiration of lease containing agreement against alienation—Assignment by person entitled to tenant's interest but not in occupation—Land Law (Ireland) Act, 1881 (44 & 45 *Vict. c.* 49), *s.* 1—*Land Law (Ireland) Act* 1896 (59 & 60 *Vict. c.* 47), *ss.* 5 (1) (*b*), 19, 50.

By lease, dated the 7th June, 1865, one of two holdings was demised to William, Earl of Meath, for eighteen years from the 25th March, 1862. The lease contained a covenant against assignment without the consent of the landlord. By agreement of the same date the other holding was let to William, Earl of Meath, for the same term and subject to the same covenants. On the expiration of the lease, on the 25th March, 1880, William, Earl of Meath, continued in possession of both holdings, paying the same rent. He died in 1887, when the present Earl, on the assumption that he was entitled to the tenancies under certain deeds of settlement, entered into possession of the holdings, and had since been in occupation, and paid the rent. In 1894, the Earl of Meath

(1) Before FITZGIBBON, BARRY, and WALKER, L.JJ.

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served originating notices to fix fair rents, which were dismissed by the Land Commission upon the ground that the tenancies had never become vested in Lord Meath. It was discovered that the deeds of settlement did not comprise the tenant's interests in these holdings, and that the same passed under the codicil to the will of the former Lord Meath to the Dowager Countess of Meath. By indenture, dated the 26th October, 1895, the Dowager Countess, for a nominal consideration, assigned the holdings to Lord Meath, and on the 30th October, 1895, notice of the assignment was served on the landlord.

In January, 1896, Lord Meath again served originating notices to fix fair rents:—

Held (affirming the decision of the Land Commission), that the covenant against alienation contained in the original letting extended to the tenancy from year to year, which arose on its expiration, and that the assignment to Lord Meath was void; that the Countess of Meath was not in occupation, either personally or by Lord Meath as her bailiff, and that Lord Meath was not entitled to serve notice to fix a fair rent.

THE facts of the case are fully set out in the report of the case in the Court below, *ante*, p. 39.

Matheson, Q.C. and *Molony*, for the appellant.

Wakely, and *T. M. Healy*, for the respondent.

Feb. 4.

FITZ GIBBON, L.J.:—

Of the many matters discussed in the Court below, only one remains for decision here, and we affirm the order of the Land Commission upon the substantive ground stated in it; we do not decide any other question, substantial or unsubstantial.

Lord Meath has served a notice to fix a fair rent, which he can do only on showing that he is a present tenant within the meaning of the Land Acts. His tenancy is admittedly derived from William, Lord Meath, and unless the original tenancy of William, Lord Meath, is now vested in the appellant, he fails. William, Lord Meath's tenancy was, as regards one portion of the holding, at first a tenancy for eighteen years, and as regards the other portion, it was under an agreement for the same term. The expired tenancy for eighteen years was followed by a continuing tenancy from year to year, upon the same terms.

Mr. Matheson first argued that, apart from the Act of 1881, the clause against alienation that existed in the lease for eighteen years was not carried forward by the rule of law, which subjects a

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continuing tenancy from year to year to all the terms of the original contract, so far as they are applicable to a tenancy from year to year. There is nothing in a clause restraining alienation which is not as fully applicable to a tenure from year to year as to a tenure for a fixed term of years. Where a tenant holds under a lease or agreement in writing, for a term which comes to an end, and he continues in possession without making any fresh agreement, there is a presumption that all the terms of the old agreement continue to apply, except so far as they are rendered inapplicable by the change in the duration of the tenancy. I say presumption, because it is always open to the parties to show that, though many of the terms are carried on by express agreement or by tacit implication, other terms do not continue. Any term may be dropped or changed by actual contract, and, in other cases, certain conditions, such, for example, as agreements to erect buildings within a fixed period, may be impliedly dropped, or may become inappropriate, and will consequently be held not to be continued by implied contract.

In the present case we are not left to presumption, for the notice served by Lord Meath on the landlord, purports to state the transaction which had taken place between himself and the Countess, and it is stated not only that the original tenancy was assigned, and that it was assigned with, and subject to, all the covenants and conditions contained in the original contract, but furthermore, that the assignee had covenanted to indemnify the assignor against any breach of these terms. It is clear, under these circumstances, apart from the Act of 1881, that the continuing tenancy, of which the appellant purported to take an assignment from his mother, was subject to the condition against alienation contained in the original lease.

As regards the effect of such an attempt to assign, it has been held again and again, and it is quite too late now to question the law anywhere below the House of Lords, that, whether the form of the restraint is condition, covenant, penalty, or additional rent, alienation is restrained, and any attempt to violate the restraint is illegal and absolutely void. Therefore, unless the Act of 1881 makes a difference, the title which the appellant claims is through a deed which is void; he has no title; and he cannot serve an originating notice as a present tenant.

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The question is thus reduced to this—Whether the only statute relied on, the Act of 1881, sect. 1, has got rid of the difficulty by removing the restraint on alienation? When the Act says that "the tenant for the time being" may sell his tenancy, the transaction before us bristles with difficulties in the way of holding that this section can apply to it. We do not decide any of these points, because the one ground on which we base our judgment overrides them all. But there is, for example, the question whether a transaction which is really a gift, and not a sale for a price, can be brought within the scope, or dealt with by the machinery, of this sect. 1. It is obvious that the effect of a decision in the affirmative might be injurious to the tenants. It might even lead to the extraordinary result that under the Act of 1881, until amended by the Act of 1896, the landlord might have stepped in and exercised his right of pre-emption upon the occasion of a voluntary transaction by a tenant which was not a sale at all. Further questions would arise upon the strange wording of the Act of 1896, sect. 19.

But the real questions are:—What is the meaning of "the tenant for the time being"? and—What are "the holdings to which this Act applies"? and—Do the appellant and his holding fall within these words? I am of opinion that the first section of the Act can only apply to persons who are tenants for the purposes of the Act, and to holdings which are holdings within the Act. The reference to specially excepted holdings shows this; for the excepted holdings are holdings of an agricultural or pastoral character, specially excepted as being held under judicial leases, town parks, demesne lands, or the like. Therefore, upon the true construction of the Act, no tenant is relieved from the restraint against alienation, unless he is himself a tenant for the purposes of the Act, and unless the assigned land is a holding within the Act. Therefore, it must be shown that, when she assigned to her son, the Countess of Meath was a present tenant entitled to fix a fair rent. This she was not, unless she was then the occupier of the holding.

Mr. Matheson and Mr. Molony both rested their arguments on a position which, if they could have maintained it, would have saved all further trouble, namely, that she was actually in occupation of the land—that is, that she was the occupier in fact, as distinguished

from having merely a title as owner of the tenancy. Personally she certainly was not in occupation, but on the authority of *Moir* v. *Blacker* (1), it was contended that Lord Meath was in occupation as the servant or bailiff of his mother, and that his occupation was hers. That is a question of fact. Nothing could more clearly disprove this contention than the deed executed by Lady Meath and Lord Meath on October 26th, 1895. It recites that Lord Meath had farmed the lands; that he had gone into occupation under a belief that they were his own; that Lady Meath did not know that she was entitled to them; that she had not farmed them, and that she did not want to farm them; that Lord Meath had spent his own money on them; that she wanted to waive all her claims; and, finally, that he was to indemnify her from all claims on account of the lands, or their use or occupation. By the terms of this deed the parties force us to the conclusion that there never was any occupation in fact by the Countess. But then Mr. Matheson and Mr. Molony contend that the discovery of the mistake turned Lord Meath's occupation into that of his mother, and that, as this discovery was made sometime before the execution of the deed, she was in occupation at the moment of the assignment. The terms of the deed again answer this contention. The deed clearly indicates that Lord Meath was at no time his mother's representative; that there was no change in the character of his occupation down to the time when he executed the deed; and that the deed was executed by his mother, without her having ever occupied, as an assignment by her, not being in occupation, to him, being then and previously in occupation. It is, therefore, an assignment by a person who was not within the Act of 1881, sect. 1, to a person who had not got the consent necessary to validate the assignment. If that be so, the case is at an end, and I decide it on that ground.

It is right to notice an argument pressed by Mr. Matheson, viz. that this conclusion is not consistent with *Nelson* v. *Headfort* (2), because William, Lord Meath, having been within the Act, the holding could not get out of the Act afterwards. The first line of section 1 puts an end to this point, by defining the person enabled to sell as the tenant "*for the time being.*" Assuming the holding

(1) 26 L. R. Ir. 375. (2) 18 L. R. Ir. 407.

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to be within the Act, you must still show that the assigning person is the tenant of it, within the Act, at the time when he executes the assignment; otherwise he cannot rely on the section. Any other construction would extend the operation of the Land Acts to others than occupying tenants. The same answer applies to the Act of 1896, sec. 19. If none but occupying "tenants for the time being" can assign under the Act of 1881, sect. 1, they only can carry out *quasi* sales under the Act of 1896, sect. 19. The power of sale under the Act of 1881 is a power incidental to a tenancy which has attached to it the right to have a fair rent fixed; and none but a tenant who has a right to have a fair rent fixed is entitled to sell under that Act, or to call in aid the Act of 1896.

For these reasons, I am of opinion that Lord Meath never got any title to a tenancy in the lands, and therefore never acquired any title to serve an originating notice as a present tenant.

BARRY, L. J. (1):—

I have nothing to say beyond expressing my concurrence with the judgment of Fitz Gibbon, L. J., and my concurrence in the various reasons for that logical judgment. I own that during the progress of the argument I was deeply impressed with one circumstance, that beyond a doubt the present Lord Meath was potentially the tenant in occupation of these lands—he was the occupier in fact—he paid the rent—he was accepted as tenant by Mrs. Megan, and she was very glad to have such a tenant. But it turns out that that potential tenancy, and that occupation in fact, arose out of a mistake. For many reasons I need not go into—Mr. Healy made use of the term "suppression"—the evidence did not establish any such condition of affairs; but it does establish this, that there was a mistake, and that whereas there was an agreement that Lord Meath was to get possession of certain lands under his father's will, upon paying a certain sum of money, he did not get them. But the mistake he made was in thinking that these lands were included in the denominations which he was to take over on paying this sum of money. It turns out that they were

(1) These notes were not revised by the late Lord Justice.—[REP.]

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not so included, and, the mistake being discovered, this mode of getting over the difficulty (which was only a technical one) was adopted, of getting an assignment of the interest, which under the will passed to the widow, to her son, the present Earl. That was carried out by the deed which contains very important provisions, referred to by Fitz Gibbon, L. J. The position of affairs then is this. Lord Meath had for some years the occupation. He was recognized as tenant, but he had not the legal title to the tenancy. What is the effect of the deed on that state of affairs? It is at once alleged that it is contrary to the clause against alienation. Lord Meath's counsel contend that once the Act of 1881 passed and applied to the tenancy, there was no fetter on alienation so as to affect the sale under the first section of the Act; and they base their argument on the authority of *Wright and Tittle's Contract* (1) which decided that the first section of the Act of 1881 put an end to the clause against alienation. Then it was contended that that clause only relates to tenants in occupation of holdings, and to effect a sale it is necessary that the vendor should be a tenant in occupation. I cannot get over the language of the section, the definition of the tenant occupying a holding. Then it is argued that this alienation clause did not apply at all, because, the lease having expired, there is a tenancy from year to year, and the clause against alienation would not affect, by implication, a tenancy from year to year. Well, I confess that on hearing that proposition I asked the counsel for Lord Meath: Did he mean to say that there cannot be a tenancy from year to year with a condition against alienation? Why should there not be a tenancy from year to year with a non-alienation clause? It has been determined in the old case so often referred to, *Right* v. *Darby and Bristow* (2), that when a lease is determinable on a certain event, or at a particular period, no notice to quit is necessary, because both parties are equally apprised of the determination of the term. That has been applied again and again to a tenancy from year to year. If there is a certain event on which a tenancy from year to year is to determine, it determines upon that event without notice to quit equally as for a breach of contract. There was another argument

(1) 29 L. R. Ir. 111. (2) 1 Term Rep. 159.

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addressed to us by Mr. Matheson and Mr. Molony, that there was in fact an occupation by the Dowager Countess during the time her son was in occupation, and her son was a sort of bailiff for her. Well, it is enough to say in answer that by the deed, which forms the by-all and end-all of the position, an end at once is put to that, and there was no such thing as a bailiff in the transaction. I am of opinion that the appeal must be dismissed.

WALKER, L.J. :—

The first question I should like to say a word on is, whether there was a covenant against alienation attached to the implied tenancy from year to year arising after the determination of the lease. The covenant in the lease is plainly a covenant against alienation, because it has long since been decided that a covenant giving leave to alienate on certain conditions is equivalent to a covenant against alienation within the 10th section of Deasy's Act. Mr. Matheson contends that this was a yearly tenancy to which the condition would not apply. There are two answers to that: first, I think it does attach to the implied yearly tenancy as one which is not inconsistent with it: and, secondly, as far as it is a question of fact, we have here a statement of fact in the deed signed by both the Countess of Meath and Lord Meath that the assignment to Lord Meath is made subject to the covenants and conditions which affect the tenancy from year to year. Therefore, in any way, there was a covenant against alienation in this implied tenancy from year to year. When Lord Meath first came before the Court to fix a fair rent, on the first hearing he had no title, though he was in occupation, as between him and the original owner: on the second hearing he had not the title though he retained the occupation. It is quite clear, in consequence of the covenant against alienation, that he could only acquire title by being clothed with one under the section in the Act of 1881, by which the effect of the non-alienation clause would have been got rid of and his occupation would have been clothed with title. But to give the deed that effect the Countess should have been an occupying tenant. The way that Mr. Matheson seeks to get over the difficulty is this:—first, he says the Countess was the occupier, inasmuch as Lord Meath was in fact not an occupier but only a

bailiff to his mother, the Dowager Countess. But really the answer to that is to read the deed which does not proceed on any such assumption, but the contrary, and also the notice which was served contemporaneously with the deed. Both deed and notice state that the Dowager Countess of Meath had parted with her estate to the present Earl, which is wholly inconsistent with the idea that he was her bailiff or agent. In that view the deed should have been only an affirmance of the title and estate already in herself. On the contrary, the instrument of title on which the Earl claims shows that he took it as a conveyance from her to him.

The next way it was attempted to be answered was that, though he was out of occupation, it was immaterial, because the former Earl was as tenant in occupation entitled to sell and convey under section 1, and therefore his successor in title, as distinguished from his successor in occupancy, was entitled to sell, as the first person with whom the title started was in a position to do so. That would lead to a most extraordinary anomaly, because if that were so the former Earl might make a subletting *bona fide* to another, and then as a reversioner sell under section 1, and the landlord's right of pre-emption would attach only to the reversion, and the landlord would buy the reversion only. The whole of this section is against any such idea. The whole frame of it shows that it refers to sales by a person at the time in occupation of a holding. It is the tenant "for the time being" who may sell. "The time being" relates to the time of sale. It is quite plain that the boon conferred by the Act was on occupying tenants alone, and a policy to benefit them underlies the whole legislation. I agree that the appeal is untenable and should be dismissed.

Solicitors for Lord Meath: *Hamilton & Craig.*
Solicitor for landlord: *J. K. Toomey.*

R. D. M.

Appeal.
1896.
Nov. 17–19.
Dec. 7.

THE QUEEN (RICHARD CREED) *v.* THE JUSTICES OF THE COUNTY OF TIPPERARY (1).

Tithe rentcharge—Septennial variation of certificate—Petition for—"Then ensuing Sessions"—Tithe Composition Act (4 *Geo.* 4, *c.* 99), *s.* 43.

On the 7th September, 1895, a notice was served by three tithe-payers on the lay impropriator, stating that an application to vary the tithe rentcharge would be made to the Justices of the Peace for the county of Tipperary assembled at Tipperary for the division of Cashel on the 31st October, 1895. Notice of the intended application was affixed on the principal doors of the church in the parish, pursuant to the statute 4 Geo. 4, c. 99, on the Sundays of 22nd and 29th September, 1895. The parish in which the lands were situate was in the division of Cashel. By a Proclamation of the Lord Lieutenant and Privy Council, dated the 19th October, 1871, the county of Tipperary was divided, for the purpose of Quarter Sessions, into four divisions—(1) Clonmel, of which the Sessions town was Clonmel; (2) Cashel, of which the towns were Cashel and Tipperary; (3) Nenagh, of which the towns were Nenagh and Roscrea; and (4) Thurles, of which the Sessions town was Thurles.

Quarter Sessions for the county of Tipperary next after the 29th September, 1895, were held at Nenagh on the 4th October, at Thurles on the 12th October, at Clonmel on the 22nd October, and at Tipperary on the 31st October.

The County Court Judge sitting at Tipperary heard the case, and made an order reducing the tithe rentcharge. On motion for a writ of *certiorari* to quash this order:—

Held, reversing the decision of the Queen's Bench Division (Sir P. O'Brien, L.C.J., and Johnson, J., *diss.* O'Brien, J.), that the Quarter Sessions at Tipperary had jurisdiction to hear and determine the case.

APPEAL from the order of the Queen's Bench, dated the 28th June, 1896, making absolute a conditional order for a writ of *certiorari* to bring up and quash an order of the Quarter Sessions at Tipperary, dated the 31st October, 1895, reducing the tithe rentcharge of the parish of Clogher, in that county, on the application of three persons charged with the requisite amount of the rentcharge.

(1) Before LORD ASHBOURNE, C., and FITZGIBBON, BARRY, and WALKER, L.JJ.

Richard Creed was the lay impropriator of the tithes of the parish of Clogher, in the county Tipperary; and, on the 7th September, 1895, notice was served on him by Mrs. Going, Patrick Cody, Richard Pennefather, and J. W. Murphy, of their intention to apply to the Justices of the Peace for the county Tipperary at the Quarter Sessions to be holden at Tipperary for the Division of Cashel, in the said county, on the 31st October, 1895, that the tithe composition and tithe rentcharge in lieu thereof, in the said parish, might be varied pursuant to the Acts of Parliament relating to tithe composition; and for that purpose that the average price of wheat for the preceding seven years might be inquired of and ascertained in order that the tithe rentcharge might be varied and diminished for the ensuing seven years in proportion to such average price.

The parties were all owners or occupiers of land in the parish of Clogher, charged with the annual payment of £3, or upwards, each, in respect of tithe rentcharge, and copies of this notice were posted on the Sundays of the 22nd and 29th September, 1895, on the Parish Church of Clogheen, and the Churches of Maliffe and Holycross. The county Tipperary was originally divided under a Proclamation from the Lord Lieutenant and Privy Council in Ireland, dated the 13th November, 1787, into three divisions, for the purposes of Quarter Sessions, namely (1), the Clonmel Division, of which the towns for sessions were Clonmel, Clogheen, and Carrick; (2), the Cashel Division, of which the towns were Cashel and Tipperary; and (3) the Nenagh Division, of which the towns were Nenagh, Thurles, and Roscrea. This was the division of the county at the date of the passing of the Act of 4 Geo. 4, c. 99; but it was subsequently changed, and by a Proclamation dated the 19th October, 1871, Tipperary was divided into four districts, viz. (1), Clonmel, of which the Sessions town was Clonmel; (2), Cashel, of which the towns were Cashel and Tipperary; (3), Nenagh, of which the towns were Nenagh and Roscrea; and (4), Thurles, of which the Sessions town was Thurles. The district in which the parish of Clogher was situated was the Cashel district, and the Quarter Sessions held for the county Tipperary after the 29th September, 1895, were as follows:—Nenagh, on the 4th October, Thurles, on the 12th October, Clonmel, on the

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22nd October, and Tipperary, on the 31st October. The case was heard by the County Court Judge at Tipperary on the 4th November, this day having been fixed for the hearing by the solicitor for the applicants, and by order dated the 31st October, 1895, the tithe rentcharge was reduced. Richard Creed applied to the Queen's Bench for a writ of *certiorari* to quash this order, and on the 29th June, 1896, the Queen's Bench gave judgment, making absolute the conditional order for the *certiorari* to issue.

From that judgment the tithe-payers appealed (1).

(1) The following judgments were delivered in the Queen's Bench Division (29th June, 1896):—

JOHNSON, J.:—

This is a motion by the Lay Impropriator of the tithe rentcharge of the parish of Clogher, in the county of Tipperary, to make absolute a conditional order for a writ of *certiorari* to bring up and quash an order of Quarter Sessions at Tipperary, dated the 31st of October, 1895, reducing the tithe rentcharge of that parish on the application of three persons, charged with the requisite amount of the rentcharge. The order of Quarter Sessions has been impeached on several grounds, but the objection taken to it *in limine* is that it was made without jurisdiction, inasmuch as the Quarter Sessions at Tipperary were not the Quarter Sessions to which the application ought to have been made pursuant to the 4 Geo. 4, c. 99, s. 43.

The 1 & 2 Vict. c. 109, s. 32 (1838) provides that rentcharge in lieu of composition for tithes shall be subject to septennial variation by increase or decrease, as compositions for tithes then were on the application either of three or more persons, each charged with the payment of £3 or upwards of the rentcharge in the parish, or of any party entitled to the receipt of the rentcharge, the like notice being given and proceedings taken "as by the provisions of the said several Acts for establishing compositions for tithes in Ireland authorised and directed in the case of application thereunder." The notice and proceedings are enacted by the 4 Geo. 4, c. 99 (1823), s. 43, which requires notice of the application to be posted between the 1st of May and the 1st of October, in the prescribed manner, "on two successive Sundays, the last of such Sundays not being less than eight days previous to the day of holding the then ensuing Quarter Session for the Peace in the county in which such parish shall be situate, signifying that it is the intent of" the applicants "to make application to the Justices of the Peace at such Quarter Sessions." This condition being complied with, the applicants are then authorized "to make such application to such Justices at Quarter Sessions, in writing, for such purpose accordingly"; and "thereupon it shall be lawful for such Justices, and they are hereby required, at such Sessions or any adjournment thereof, to ascertain the average price of good marketable wheat or oats within

Ronan, Q.C., and *T. F. Molony*, for the appellants:—

There are two questions—(1), whether the division is the right one, and (2), whether the time for the application was the first Sessions. The decision of the Queen's Bench proceeded upon the view that Quarter Sessions mean the first place where the magistrates meet in any part of the county, and that the Quarter Sessions held at Nenagh or Thurles was a Quarter Sessions for the county Tipperary. The fallacy of that is that the Civil Bill Act prescribes that there shall be four Quarter Sessions—Easter, Summer, October, and Hilary; that the existing divisions shall

said county" for the seven years preceding (see 1 & 2 Vict. c. 109, s. 32), and the rentcharge is to be increased or diminished accordingly.

The question for decision, on this part of the case, is what are the Quarter Sessions enacted by this statute, the whole proceeding being purely of statutable creation. For the Impropriator it is contended, against the jurisdiction which is challenged, that it is the Quarter Sessions for the Peace in the county Tipperary, held in any part of the county, next ensuing the posting of the notice of application on the second Sunday not less than eight days previous to the day of holding that Quarter Session. For the defendants, the rentcharge payers and applicants, it is contended, in support of the order which is challenged, that it is the Quarter Session of the Peace in the county Tipperary, to be held in the division of the county in which the parish is situate next after the eight specified days, whenever that Quarter Session may be held.

Quarter Sessions and Civil Bill Courts, though under Proclamation of the Lord Lieutenant in Council held usually in the same division and town, and at the same periods of the year, are entirely distinct from each other. The Court of Quarter Session is constituted of the Justices of the Peace, of whom the County Court Judge is Chairman by Statute. The Civil Bill Court is constituted of the County Court Judge alone. Justices of the Peace have nothing to say to it. By the 36 Edw. 3, c. 12, the 12 Rich. 2, c. 10, and the 2 Hen. 5, c. 4, a general Session of the Peace in and for each county was established and ordered to be held four times in every year in every county in England, on the Festivals of St. Michael, the Epiphany, the close of Easter, and St. Thomas, hence the title Quarter Sessions. These Acts were extended to Ireland by Poynings' Act, 10 Hen. 7, c. 22. In 1787, by the 27 Geo. 3, c. 40, sect. 3, for the better execution of the law and preserving the peace, the Lord Lieutenant, with the advice of the Privy Council, was empowered to divide such counties in Ireland as they thought fit into such number of districts as to them seemed meet for the purposes of that Act and no other, each district to consist of baronies or half-baronies and to be distinguished by the name of one of the baronies or half-baronies. Section 14 enacted that General

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remain till altered; but the Lord Lieutenant and Privy Council may alter the divisions, and might nominate and appoint the baronies and half baronies in which such Sessions shall be held: ss. 30, 31, and 32 of 14 & 15 Vict. c. 57. The result is that the four general Quarter Sessions each consists of four parts, one part of the October Sessions being held in each of the divisions. But

Sessions of the Peace should be held in every county so divided into districts eight times in every year at the least, the four new Sessions to be held in six weeks from the holding of the then four Quarter Sessions, and in towns to be appointed at which such Sessions should be held. Section 15 empowered the Lord Lieutenant to appoint a barrister of at least six years' standing "to assist"—hence the title "Assistant Barrister," afterwards adopted by Statute—the Justices at every Quarter Sessions. Notwithstanding the addition of these four new Sessions, the eight General Sessions of the Peace were termed Quarter Sessions from the four times in the year at which they were held by Proclamation.

Under this Act, dated the 20th of July, 1787, the county Tipperary was divided into seven districts, and by Proclamation (13th November, 1787) the towns of Clonmel, Cashel, Thurles, and Nenagh were appointed as the towns "at which General Sessions of the Peace should be holden successively."

Probably long before 1703, by some jurisdiction of which the origin cannot be accurately traced, small debts were recoverable in a summary way before a Judge of Assize; but, in that year, by the 2nd Anne, c. 18 (Ir.)—a temporary Act, subsequently continued, and afterwards, by 2 Geo. 2, c. 11 (Ir.), made permanent—Judges were expressly empowered to hear and determine small demands in a summary way by "English Bill or paper petition in English." An effectual mode of settling small disputes in a summary way proved so useful to the country that in 1796 a new Civil Bill Jurisdiction was created by the 36th Geo. 3, c. 25 (Ir.), by which the Lord Lieutenant, with the advice of the Privy Council, was empowered to divide counties "into two divisions for the purpose of the more conveniently hearing and determining of Civil Bills only," each division to consist of baronies or half-baronies, or both, without regard to or affecting such districts as the county might have been divided into under the 27th Geo. 3, c. 40, and to appoint one or more convenient town in each division in which a "Civil Bill Court should be held four times in every year at some General or Quarter Sessions of the Peace or some adjournment thereof for the county." Sections 2 and 5 substantially re-enacted section 15 of the Act of 1787, for the appointment of an Assistant Barrister, and section 14 of the Act of 1787, for the holding of General Sessions of the Peace in every county eight times in the year; and section 6 empowered the Assistant Barrister, in the appointed town of such division, and at some General Session or Quarter Session of the Peace, or adjournment

there are no Sessions for the county at large. The Sessions held at towns in the county are all separate Sessions: *Reg.* v. *Justices for the county Antrim* (1); *Reg.* v. *Justices for the county Armagh* (2).

The next Quarter Sessions therefore meant the town at the next Quarter Sessions where it would be most convenient to have

thereof, to hear and determine Civil Bills, of the class and amount specified in the section, with the same jurisdiction as the Judge of Assize had under the 2nd Geo. 2 (which made permanent the 2nd Anne) and its amending Acts. In every Civil Bill Act from 1703 to the present time provision is expressly made that no defendant, not being one of several defendants, shall be sued by Civil Bill out of the division in which he resides, or, in later times, carries on business; but the Legislature, whenever it intended that any proceeding should for any particular purpose be taken at, or appeal made to, any particular Quarter Sessions, whether Civil Bill Sessions are held in the same town or not, has always, so far as I am aware, enacted that intention in plain and unmistakable terms, as appears by several Acts which are frequently brought under the notice of this Court. By the 7 & 8 Geo. 4, c. 53, s. 82 (an Excise Act), an appeal is given to the next General Quarter Sessions of the Peace to be holden in and for the county, shire, division, town, or place in which the judgment appealed from was given. A similar illustration is to be found in the Licensing Act, 3 & 4 Wm. 4, c. 68 (1833), s. 25; and, in order to localize appeals from licensing convictions, it was enacted by 4 & 5 Wm. 4, c. 93, that the appeal should be to the "next General or Quarter Sessions of the Peace to be held in the same Division of the County wherein the order or conviction was made or pronounced, and not at the Sessions holden in any other Division of such County, anything in any Act to the contrary notwithstanding;" and the Petty Sessions Act (14 & 15 Vict. c. 93, s. 24) provides that the appeal shall be to the next Quarter Sessions—*i. e.* the next Sessions practically possible, as judicially interpreted—to be held in the same division of the County.

The county Tipperary is at present divided into four districts or divisions, viz. the Division of Clonmel, in which in the town of Clonmel four Quarter Sessions, or General Sessions for the Peace in the county, and also four Civil Bill Sessions, are held every year; the Division of Cashel, in which, each in the towns of Cashel and Tipperary, two Quarter Sessions and two Civil Bill Sessions are held every year; the Division of Nenagh, in which, in the town of Nenagh, four Quarter Sessions and four Civil Bill Sessions are held every year; and the Division of Thurles, in which, in the town of Thurles, four Quarter Sessions and four Civil Bill Sessions are held every year. *The Queen*

(1) 8 Ir. Jur. (N. S.) 47. (2) [1895] 2 Ir. R. 503.

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the case heard: *Reg.* v. *Justices of Sussex* (1); *Reg.* v. *Justices of county Cork* (2); *Reg.* v. *Justices of Surrey* (3). Any other conclusion would lead to absurdities: it would be unreasonable to hold in so large a county as Tipperary that all the tithe cases should be heard at Nenagh because it was the first town.

v. *The Justices of Antrim*, cited by Mr. Campbell, decides that each of these Quarter Sessions is a distinct General Sessions of the Peace, or Quarter Sessions for the Peace in the county, though held in a particular town and division of the county, and therefore where a Statute (24 & 25 Vict. c. 91, s. 19) authorized an appeal "to the Justices at the next General Quarter Sessions of the Peace which shall be holden for the county, shire, division, city, town or place, in which such judgment so appealed against shall have been given," and the judgment appealed against was given at Belfast, the appeal ought to have been brought to the Quarter Sessions next held at Belfast, being, in the words of the Statute, "the town in which the judgment appealed against was given." The Statute in that case is another illustration of the distinction taken by the Legislature, where it authorizes an application to the next Quarter Sessions for the Peace in the county (see *Reg.* v. *Justices of Sussex*), and an application to the next Quarter Sessions of the Peace in the county, to be holden in a specified or particular locality or division in the county.

There is no ambiguity in the words of the 4 Geo. 4, c. 99, section 43, which creates and governs the application to be made "to the then ensuing Quarter Session for the Peace in the county in which the parish is situate." I think the Legislature meant what it said; if it had intended the application to be made to the then ensuing Quarter Session "to be held in the division of the county" in which the parish is situate, it would have said so. The last Sunday on which the posting was made was the 29th September; the next ensuing Quarter Session in the county was at Nenagh on the 4th October; but that would not have allowed for the eight days which the Statute required to elapse previous to the day of holding the Session. The then ensuing Session after the eight days was at Thurles on the 12th October. There was another at Clonmel on the 23rd October, and then came the Quarter Sessions at Tipperary on the 31st October, where the application was in fact made, and to which Sessions the notice stated it would be made. In my opinion, for the reasons I have stated, the Quarter Sessions at Thurles was the Court to which (except by adjournment), the Statute enacted that the application should be made, and to which alone it gave jurisdiction to entertain and to decide upon the application. I therefore think that the order of the Quarter Sessions at Tipperary is void, being made without jurisdiction. In this view it is not necessary for me to express any opinion on the other

(1) 4 B. & S. 966. (2) 28 L. R. Ir. 185, 196. (3) 6 Q. B. D. 100.

R. E. Meredith, Q.C., Campbell, Q.C., and *Arthur Meredith*, for the relator:—

This being an Act of Parliament which alters the rights of the tithe-owner, must be construed strictly. "The then ensuing Quarter Sessions" means the first sitting for the October Sessions, wherever it is held. That, we submit, is the true legal construc-

points discussed in the case, and for these reasons the conditional order ought, in my opinion, to be made absolute.

O'BRIEN, J.:—

The Tithe Composition Act of 4 Geo. 4, c. 99, provides in section 43 for the variation of the amount in any parish every third year, afterwards extended to the seventh year, upon a notice given between the 1st May and the 1st October, to be posted two successive Sundays on the church door of the parish, the last of such Sundays not to be less than eight days previous to the day of holding "the then ensuing Quarter Session for the Peace in the county in which such parish shall be situate," signifying the intent to apply to the Justices of the Peace "at such Quarter Sessions;" and the section goes on to say that it shall be lawful for the person or parties, by or on whose behalf such notice shall have been given, to make such application "to such Justices at such Quarter Sessions" in writing for such purpose accordingly; and thereupon it shall be lawful for such Justices, and they are required at such Sessions or any adjournment thereof to ascertain the price of corn in the county for the preceding three years, and they may appoint an arbitrator, if they think fit, to ascertain and state the price at such Sessions or any adjournment thereof.

In this case the notice was posted within the period, but eight days did not expire before the holding of the Sessions in the first of the districts in which for each quarter they are appointed to be held, and the application was made in a later district, in which the parish was situate. The lay impropriator contends, upon motion for a *certiorari*, that the tribunal was wrong, and that the application could only have been made in the first of the districts, for which, however, the required length of notice was not given. The question will be probably found to narrow itself to the point, what is the meaning of "the then ensuing Quarter Session for the Peace in the county in which such parish shall be situate," by reference to which the time of notice is measured, whether it means the Quarter Sessions generally, to which jurisdiction belongs, or is confined to that division "in which they may first happen to be held;" and whether the ordinary function of a notice is not satisfied by the former circumstance. Of course we can understand why there must be a certain time within which the notice must be given, within the six months from May to October. That is complied with in this case. We can also understand why

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tion. In England the view taken of the Quarter Sessions is that they are one and indivisible; they commence at the sitting at the first town, and the sitting at the other towns are only adjournments: *Reg.* v. *Justices of Lancashire* (1). The place where the case is heard does not matter; but the notice must be given the requisite number of days before the sitting in the first town in the

the matter should not be indefinitely delayed. That is provided for also, because the proceeding must be taken at the next Quarter Sessions. Too short a notice, further, would violate the reason of notice. But, once a starting point is fixed, and the notice is given, it is not easy to understand why it should be in the intention of the Legislature that the time should not be reckoned forward, provided it falls within the limit of time fixed for the Quarter Sessions, instead of backwards from a point short of that limit. The applicants had the whole of six months within which two quarters for holding Sessions fell; and, if, instead of giving notice towards the end of that period, they were to give it at an intervening time, the place of Sessions would shift in priority, so that the place which would succeed the notice in one case would not in another; and yet the notice and the tribunal would be regular in both cases. When the Tithe Compositien Act was passed there were then in existence Statutes of the Irish Parliament, not different from the enactment which is found in the Civil Bill Act, dividing counties for the purpose of Quarter Sessions into different districts, and containing the same declaration that each shall be capable of transacting all the business usually transacted at a General Quarter Session of the Peace. We have therefore a notice in time, of sufficient duration, and a jurisdiction competent to entertain the application. If indeed the statute has said that the application must be heard at a particular time, though no reason can be given for it, it must be followed, but the fact that there is no reason affects the question whether that is what the statute has said. Now, what are the words? "The then ensuing Quarter Session for the Peace in the county in which such parish shall be situate." "Session," in the singular, is relied upon, as if it pointed to one of the districts into which the Quarter Sessions are divided. But it cannot have that effect, for, immediately afterwards, it states the application may be made at such Quarter Sessions, in the plural; and the Justices are required "at such Sessions or any adjournment thereof, &c." What prevents the then ensuing Quarter Session being construed the Sessions for the quarter then ensuing, according to the original division and name of the jurisdiction. In the Act of 4 Geo. 4, there is no reference whatever to the districts into which the Quarter Sessions were divided by the Irish Acts; and it is probable that, after the Union, ante-Union Statutes were never thought of. If the Quarter Sessions were divided

(1) 8 E. & B. 563.

county where Sessions are held: *Reg.* v. *Justices of Lancashire* (1). There are many other statutes in which the same or similar words occur, in all of which the words must receive the meaning for which we contend. In the Summary Jurisdiction Act (14 & 15 Vict. c. 92, s. 23), a party may appeal to the "next Quarter Sessions." The same words are used in the Petty Sessions Act

it must be for some purpose of convenience, though particular business was not attached to each locality; and certainly it is a strong thing to say, that an application which is made in the locality consistently with such purpose of convenience is wrong. Further, the priority of the divisions in time not being fixed by public authority, and being liable to be varied, the person serving notice has no certain means of knowing what may be the first place of holding the Sessions after the end of October. It must be borne in mind that the incumbent might apply as well as the parishioners, and the mode of serving notice, by posting on the Church door, appears to have relation to the parish to which they belong and in which the lands are situate; and yet, according to the other construction, they both would be required to go to another part of the county altogether. But there is something else in the statute that touches the point very closely, whatever effect it may have. The 39th section gives a right of appeal against inequality in the assessment or applotment of the lands in the parish, and the appeal is given "to the Justices of the Peace at their General Quarter Sessions of the Peace, or any adjournment thereof, for the county or place in which such parish shall be situate," following the procedure required in the 55th section as to convictions; and in this latter the appeal is given "to the Justices of the Peace at the next General or Quarter Sessions of the Peace to be holden for the county or place;" and the person appealing either against a conviction or an applotment, as in the 39th section, "shall, if there be sufficient time after the cause of complaint shall have arisen, give ten days' notice in writing to the Justices or other person or persons whose conviction or act or determination shall be appealed against, of the intention to appeal; and then follow the important words: "And for want of sufficient time for giving such notice previous to the Quarter Sessions next after the cause of any such complaint shall have happened, then such appeal, after such notice, and under such recognisance, may be made at the second General or Quarter Sessions of the Peace to be holden for such county or place; and the Justices, at such first or second Sessions, or any adjournment thereof," may determine the matter of the appeal. Now, it is not easy to see what is the meaning of "place" in this section, or whether it necessarily shows that divisions of the county were present to the mind of the Legislature. In any case it proves that terms are used without precision in the statute,

(1) 34 L. T. (N. S.) 124.

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(14 & 15 Vict. c. 93, s. 24); in the Betting Houses Act (16 & 17 Vict. c. 119); in the Licensing Act (37 & 38 Vict. c. 60, s. 1); in the Sale of Food and Drugs Act (38 & 39 Vict. c. 63, s. 23); and in the Refreshment Houses (Ireland) Act (23 & 24 Vict. c. 107, s. 15). But the question at the root of this matter is the jurisdiction to hear the case. Any Court of Quarter Sessions sitting anywhere in the county Tipperary might hear the case, but the notice being bad, the whole thing was without jurisdiction. Such cases as *Reg.* v. *Justices of Sussex* (1) and *Reg.* v. *Justices of Surrey* (2) do not apply, as that was simply a matter of convenience of practice, and

for there were then no General Quarter Sessions for the county as distinct from those held in a particular place. They were all General Quarter Sessions alike. But, taking it that an alternative was given of applying in the district in which the parish was, two opposite arguments are capable of being founded upon this clause. One, the usual argument, that when, in the later section, the statute did not use the word "place," it meant a different thing, and that the "then ensuing Session" was the substitute for "place." The other argument is that the words in the 39th section put an interpretation upon the words in the later section and embrace any of the divisions in which the Sessions are held, and identify the meaning of the different words as the same. No reason in the world can be assigned why the appeal against the applotment or against the conviction should be to the magistrates of a different district from the application to vary the composition. And the words of the later section, "in the county," as distinguished from "for the county," are apt words to include any place in which the Sessions are held. That much weight cannot be laid upon the exact words referring to the Sessions still further appears from the section relating to convictions, by which the appeal is to the *next* General or Quarter Sessions, which term, "next," is not used in any of the preceding sections.

I am therefore of opinion that "the ensuing Quarter Session in the County" means the next Quarter Sessions for whatever place, and that the notice having been given for the district in which the parish is situate, it would be a highly technical and wrong construction of the statute, on such a doubt to deprive the tithe-payers for seven years of the opportunity of reducing the tithe rentcharge on the ground on which rents have been reduced, of diminishing the burthen in some proportion to the diminished fund for payment.

The Lord Chief Justice, who is unfortunately unable to be present, desires me to state that he concurs in the view expressed by Mr. Justice Johnson. The conditional order for a writ of *certiorari* will accordingly be made absolute.

A. E. R. J.

(1) 4 B. & S. 966. (2) 6 Q. B. D. 100.

not a question of jurisdiction. Whether the English view is right, that there is one Quarter Sessions for the entire county, or the decision in *Reg.* v. *Justices of Antrim* (1), that there are separate sittings for each, there is no difficulty in the construction which we submit. There are many difficulties if the appellants' contention is correct. Suppose that a parish was in two divisions, the tithe-payers would be excluded from the benefit of the Act. The same result would follow if the parish was partly in one county and partly in another. The next ensuing Sessions is the Court that sits first in the county.

Dec. 7.

LORD ASHBOURNE, C. :—

This is an appeal from an order of the Queen's Bench Division making absolute a conditional order for a writ of *certiorari*, to bring up and quash an order of Quarter Sessions, at Tipperary, dated the 31st October, 1895, reducing the tithe rentcharge of the parish of Clogher, on the application of three persons, charged with the requisite amount of tithe rentcharge.

I do not deem it necessary to repeat in detail, or discuss, all the statutes that were mentioned in the argument before us. They are fully noticed in the judgment of Mr. Justice Johnson, and although it is necessary to have them in mind, the main question in the case turns upon the construction to be given to one section only, the 43rd section of the Tithe Composition Act of 4 Geo. 4, c. 99. That section provides for the variation of the amount of tithe rentcharge in any parish every third (afterwards extended to every seventh) year upon a notice given between the 1st May and the 1st October, to be posted two successive Sundays on the Church door of the parish, the last of such Sundays not to be less than eight days previous to the day of holding "the then ensuing Quarter Session for the Peace in the county in which such parish shall be situate," stating the intention to apply to the Justices of the Peace "at such Quarter Sessions." The section further enacts that it shall be lawful for the parties by whom such notice shall have been given to make such application "to such Justices at such Quarter Sessions" in writing for such purpose accordingly,

(1) 8 Ir. Jur. (N. S.) 47.

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and thereupon it shall be lawful for such Justices, and they are required, at such sessions or any adjournment thereof to ascertain the price of corn in the county for the preceding three years.

A notice dated the 7th September, 1895, by the three tithe-payers was served on Mr. Creed, the impropriator, stating that an application to vary the tithe composition would be made "to the Justices of the Peace for the county of Tipperary, assembled at Quarter Sessions to be holden at Tipperary, for the division of Cashel in the said county, on the 31st October, 1895." Notice of the intended application was also duly affixed on the principal doors of the churches in the parish, pursuant to the statutes, on the Sundays of 22nd and 29th September, 1895.

Counsel for the applicants and also for the impropriator appeared at the Quarter Sessions of Tipperary, pursuant to the said notice, and after proof was given of the fall in the price of wheat for the seven preceding years the tithe rentcharge was substantially reduced.

The impropriator then applied to the Queen's Bench Division to bring up and quash the order upon (amongst others) the point —the sole one argued before us—that the order made at Tipperary was void, the Quarter Sessions there not being according to the true meaning of the statute, "the ensuing Quarter Sessions for the Peace in the county in which such parish was situated." The Queen's Bench Division made the order asked for, Mr. Justice O'Brien dissenting.

The Quarter Sessions for the Peace in the county of Tipperary, in which the parish of Clogher is situate, held next after the 29th September, 1895, were Nenagh, on the 4th October; Thurles, on the 12th October; Clonmel, on the 22nd October; and Tipperary, on the 31st.

The Queen's Bench Division held that the Quarter Sessions at Tipperary had no jurisdiction, and that as there were less than eight clear days between Sunday, the 29th September, and the 4th October, Nenagh was out of the question, and that Thurles, where Quarter Sessions commenced on the 12th, and therefore not less than eight clear days from the 29th September, must be held to be within the meaning of the statute, "the ensuing Quarter Sessions."

The question we have to determine is whether the Quarter Sessions for the Peace, at Tipperary, on the 31st October, 1895, had jurisdiction to entertain and decide on the notice of the 7th September, 1895, to vary the tithe rentcharge. The learned counsel for the respondent conceded that they were unable to support the judgment of the Queen's Bench Division, holding that Thurles was the proper place, and they argued that Tipperary must be held to be wrong, because the one and only meaning of "the ensuing Quarter Sessions" must be the first Quarter Sessions held anywhere in the county for the October Quarter.

It was suggested in argument that the notices should be served, so as to be in time for the first town, Nenagh, even although the appeal might conceivably be heard at a later town; but I give no weight to this contention, because the words in the section "apply at such Quarter Sessions of the Peace" are clearly referential, and show that the notice should be for the town where the hearing is to take place. If the respondent's broad contention that "the ensuing Quarter Sessions" means the first—Nenagh—then all the parishes of the county, no matter where situate, might be compelled to have their tithe applications to vary heard there, —no matter how great the inconvenience, or how serious the dislocation of the other business to be transacted. If Clonmel, at the opposite boundary of this great county, was given by the County Court Judge the earliest date, then all the parishes should go there. If the argument is well founded, it would certainly involve the *maximum* of inconvenience, uncertainty, and expense.

Does "the ensuing Quarter Sessions" mean the ensuing October Quarter Sessions generally, wherever held in the county of Tipperary, or is the description confined to that one particular division of the county in which the Quarter Sessions may chance to be first held? It was argued by the respondent that if it was intended to give jurisdiction to a particular division, it would be so stated in the statute; but surely that is open to the retort that if it was intended to withdraw jurisdiction from, or deny it to, a particular division, words less wide and general would have been used than "the ensuing Quarter Sessions." Here a full and detailed notice was given of the requisite duration, duly posted, acted on by both parties, who attended and were heard in pursu-

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ance of its terms, and I ask where are the words in the section which compel us to say the particular division—Tipperary—where the parish is situate, where the notices were posted, where the parties attended and fought out their contest, had no jurisdiction? "Ensuing Quarter Sessions" are wide enough to include the ensuing Quarter Sessions at Tipperary, and I can see no valid reason why we should deny their jurisdiction. All convenience suggests the reasonableness of the division, which includes the parish, upon whose churches the notice is affixed, which comprises the locality affected, and where probably the parties reside, being permitted the jurisdiction appealed to. Mr. Justice O'Brien in his judgment points out that sect. 39 of the same statute, which gives a right of appeal against inequality in the assessment or applotment of the lands in the parish, gives the appeal "to the Justices of the Peace at their general Quarter Sessions of the Peace, or any adjournment thereof, for the county *or place* in which such parish shall be situate," and he points out that this use of the word "place" shows that the statute was not framed with any technical precision, or with any definite reference to particular divisions. Certainly no reason can be suggested why a different meaning or intention should be imputed to one section, not found in the other. I confine my judgment to the particular point, alone discussed before us, of whether the particular Quarter Sessions of the Peace, at Tipperary, had jurisdiction to hear and decide this case? In my opinion, the Quarter Sessions at Tipperary had jurisdiction, and the notice served for it was legal. The statute gave jurisdiction to the ensuing Quarter Sessions of the Peace—a term which included the ensuing October Quarter Sessions of the Peace—a term from which it would be impossible to exclude the October Quarter Sessions of the Peace held at Tipperary. The case of *Reg.* v. *Justices of Sussex* (1) strongly supports the conclusion at which I have arrived. The facts of that case and the statute discussed were, it is true, different, but the judgment of the Exchequer Chamber, pronounced by Erle, C.J., has a very pertinent application. The head note states that an order for the removal of a pauper and his family, from the parish of F. to the parish of C., was made on the 18th

(1) 4 B. & S. 966.

August, 1860, and notice of chargeability, accompanied by a copy of the order and a statement of the grounds thereof, including the particulars of the settlement relied on, were sent on the 30th August, and received on the 1st September, and a copy of the depositions were delivered on the 19th September. On the 1st October, notice of appeal to the next Quarter Sessions for the county of Sussex was given. Those Sessions were held for the eastern division of that county on the 15th October at A, for the western division, within which the respondent parish was situate, on the 18th October at B. The appellants did not, at any time, on or before the day and year last aforesaid, send or deliver to the respondents any statement in writing or otherwise of the grounds of the appeal. By the custom and practice of those sessions eight days notice of appeal was required. The appellants applied to the sessions at B. to receive and enter the appeal, and to respite it to the next Quarter Sessions, as matter of right and without showing any reason for the delay:—*Held*, in the Exchequer Chamber, consisting of Erle, C.J., Pollock, C.B., Keating, J., and Channell and Pigott, BB., that they had no right to do so. Erle, C.J., in giving judgment said:—"When for practical convenience the county is divided into distinct divisions, and in each division a distinct Court is held, so that all the questions locally arising within each division by practice belong to that division, and all the process for that division is returnable at the Court for that division, and the panels of the jurors are made out for that division, and the rules of practice made by the Court of each division for the conduct of business in it assume that the day when the Court for that division begins its sittings is the first day of the sessions for that division, we see good reason for holding that the conduct of an appeal suit which has been properly commenced, and which belongs to one of those divisions, should be governed by the rules of practice for that division, in the same manner as the notices and summonses and proceedings, other than those relating to appeals against orders of removal and poor rates are governed thereby. Much inconvenience would be saved and many failures of justice would be prevented if such were the law, and no advantage has been suggested to arise from holding the contrary, unless it be the danger of confusion between the sessions

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which have jurisdiction to receive the appeal, and the sessions which are to try it. But the danger from that source is much lessened since appellants are required by 4 & 5 Wm. 4, c. 76, and 11 & 12 Vict. c. 31 in almost all cases to commence their appeal by service of notice of appeal on the respondents, which notice would be so construed as to make it valid, if the intention of the parties to give a valid notice was apparent."

In the present case all convenience suggests the selection of the Tipperary division, and I see nothing in any statute to exclude it. In my opinion the order of the Queen's Bench Division was erroneous, and should be reversed, and this appeal allowed.

FITZ GIBBON, L.J.:—

I concur. In construing the Act 4 Geo. 4, c. 99, sec. 43, which purports to make provision for the revision, at certain intervals, of the composition which is now represented by tithe rentcharge, we are bound to attribute to the Legislature an intention to define the tribunal to which recourse could be had, by a party who was aggrieved by the existing charge, and who desired to have it altered. No less than four distinct conclusions have been suggested in the present case, and I take them *seriatim*, in order to find out which is right.

First, there is the judgment of Johnson, J.—in which the Lord Chief Justice is stated to have concurred—that the "sessions" which alone had jurisdiction to deal with this case, was the Court of Quarter Sessions first held anywhere within the County of Tipperary, after the expiration of eight days from the last of the two successive Sundays on which the notice was posted, which happened to be the Thurles Sessions. The second contention is that the first Court held within the limits of the County, at each of the four Quarter Sessions of the year, has exclusive jurisdiction to deal with these applications, and that the notice must be given in sufficient time for that Court, which in this case was held at Nenagh, for which the notice would have been late, even if it had been given for it, which it was not. The third contention is, that the only Court having jurisdiction is the Court for the division in which the parish is situate, which Court in this case was held at Tipperary, for which the notice was

given in due time. Fourth and lastly, it is said that the notice may be given either for the first Court held within the County, or for the Court held in and for the division. But, whichever of these Courts be taken, it is conceded that the notice must be posted for the last time, eight days at least before the day of holding the sessions at which the application is to be heard, and I hold, further, that the notice must specify the Court at which the application is intended to be made, so that those who are interested in opposing it may know where they are to appear.

Johnson, J., says—"The last Sunday on which the posting was made was the 29th September. The next ensuing Quarter Sessions in the County was at Nenagh on the 4th October, but that would not have allowed for *the eight days which the statute required* to elapse previous to the day of holding the sessions. The then ensuing sessions *after the eight days* was at Thurles on the 12th October. There was another at Clonmel on the 23rd October, and then came the Quarter Sessions at Tipperary on the 31st October, where the application was in fact made, and to which sessions the notice stated it would be made. In my opinion, for the reasons I have stated, the Quarter Sessions at Thurles was the Court to which (except by adjournment) the Statute enacted that the application should be made, and to which alone it gave jurisdiction to entertain and decide the application." This view was expressly abandoned by the respondent's counsel, and it plainly resulted from a confusion as to the period prescribed for the notice. There is no period of eight days; the notice must be posted on two successive Sundays, and *not less than eight days* must intervene after the last of these two Sundays and the day of holding the Court at which the application is to be made. The notice might be posted at any time after the June Sessions for the October Sessions. It might be posted at any time during two months before the holding of the Court. To say that the statute gave exclusive jurisdiction to whatever Court happened to be held next after eight days from the last posting, is not only unwarranted by the statute, it would lead to extreme inconvenience, if not absurdity. For instance, whenever several sessions are held in the same week, inasmuch as the eight days are counted from a Sunday, whatever sessions happened to be held on the earliest day in the next succeeding week, would have exclu-

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sive jurisdiction to deal with all the notices last posted anywhere in the County on the Sunday but one before, without regard to convenience or to locality. Furthermore, this construction would enable the party serving the notice to pick and choose any place in the whole County, and to give it exclusive jurisdiction, by selecting a particular Sunday for posting his notice, provided that the sessions began on an early day in the week, or that no other sessions opened in the same week. In giving up the judgment from which the appeal was taken, the respondent did not abandon anything which any member of this Court thought he could support.

But we have to consider what the true construction of the Statute is, and to see whether the notice given for Tipperary was good. To understand what the Act meant by "Quarter Session for the Peace in the County," we must see what were the sessions in the County of Tipperary in 1823, when the Act passed. Counties were divided into districts by 27 Geo. 3, c. 40, and into divisions by 36 Geo. 3, c. 25, and the General Sessions of the Peace were, under these Acts, held quarterly in each year, at periods fixed by reference to four annual festivals, and to these sessions, held in different divisions, all the business of the County was to go. Therefore, the Act 4 Geo. 4, c. 99, dealt, not with any single, general, or universal Court of Quarter Sessions held for a whole County at any one place, but, in the case of Tipperary, with Quarter Sessions held four times a year in each of the divisions of the County. Each of these Divisional Courts was a General Session of the Peace for the County of Tipperary. Each of them had jurisdiction to discharge the business appropriate to the division of the County in which it was held; and each quarterly set of these sessions made up the Hilary, or Easter, or Trinity, or Michaelmas Quarter sessions for the County of Tipperary, these sessions being held, if I may use the expression, *in compartments*. But every divisional session was independent of the others—and none was held, in any way, by or as an adjournment from another. The Court first opening in each division was a new Court, starting the Quarter Sessions *de novo* for that division, and forming a separate compartment of the General Quarter Sessions for the County, though

sitting in and for, and doing the business of, one division or district only.

A great number of other statutes have been referred to, all dealing with these Courts of Quarter Sessions, and the varieties of expression, all meaning the same thing, satisfy me that any Divisional Court will equally satisfy the words in 4 Geo. 4, c. 99, s. 43, as being a "Quarter Sessions for the Peace in the County." The Betting Houses Act, 16 & 17 Vict. c. 119, s. 13, mentions "County or place"; The Spirits Act, 18 & 19 Vict. c. 62, s. 2, mentions "division"; The Licensing Act, 37 & 38 Vict. c. 69, s. 13, mentions "division, place, or district"; The Refreshment Houses Act, 23 & 24 Vict. c. 107, s. 15, mentions "division," in describing the Quarter Sessions.

In treating all these Divisional Courts as independent compartments of the General Quarter Sessions for the County we are supported by the English case of *Reg.* v. *The Justices of Sussex* (1), and by the Irish case of *Reg.* v. *The Justices of Antrim* (2). It therefore remains only to see that, in this case, the Quarter Sessions held at Tipperary, and opening there as a Court of the October Quarter Sessions for the County of Tipperary, was an appropriate Court to consider the application to revise the tithe rentcharge of a parish situate in that division. Again, *Reg.* v. *The Justices of Sussex* (1) is an authority. What business is appropriate to each division may be determined by practice, or by reason. And what better reason could be given for hearing such an application at Tipperary than that it related to a matter in which a parish withir that division was exclusively concerned?

During the argument, some of the results that would flow from holding that the Court of a division had not this jurisdiction were pointed out. If the first Court of Quarter Sessions held within each County had the exclusive jurisdiction, all these applications—and they might be very numerous in a large county—*must* go to the town, however small or remote, in which it happened that the Quarter Sessions began. It might be some place where the Court sat for one day only, and then all the business should be adjourned—some distant and inconvenient little place, where a

(1) 4 B. & S. 966. (2) 8 Ir. Jur. (N. S.) 47.

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Court had been appointed to meet the trivial requirements of an outlying locality, might find itself inundated by parties obliged to go there in order to revise the tithe rentcharges of a whole County.

The proclamation which was published in Dublin on October 19, 1871, and under which the Tipperary Quarter Sessions are now held, appears to me sufficiently to indicate the town of Tipperary as the appropriate place for hearing business relating to parishes in that division. The County is divided into four districts, geographically marked out, and it is ordered that the towns of Cashel and Tipperary shall be towns for holding sessions in and for the district and division of Cashel, and that a General Sessions of the Peace and Civil Bill Courts for transacting all such criminal and *other business as may be cognizable and determinable at any General Sessions of the Peace*, shall be held twice in each year in these towns *in and for the said district and division.* When we have the authority of *Reg.* v. *Justices of Sussex* (1) that the ordinary practice of the Court suffices to show the Court to be appropriate, we may confidently point to the fact that this is an eminently local class of business, and may hold that the only convenient practice is that parochial business should be done in the district in which the parish is situate.

The chief objection pressed upon us against this view was the supposed difficulty in case a parish was situate partly in one division and partly in another. It seems to me that in such a case the business might well be done in either division, provided sufficient and definite notice was given for one or the other. The case to which counsel referred, of a parish situate in two counties, where it was held that the revision could not be carried out at all, raised an entirely different and an insurmountable difficulty. There the impossibility of working out the revision arose, not from any point of jurisdiction in the Court, but because the "rule of three sum," prescribed by the Act, in which one of the necessary factors was the average price of corn "within the said County"—could not be worked out when the prices for two counties were equally concerned. It was, in short, a *casus omissus.*

(1) 4 B. & S. 966.

But the case of a parish situate in two divisions raises no difficulty if the Sessions Court held in either division has jurisdiction to deal with the matter.

There is only one remaining question. Assuming that the Quarter Sessions of the division in which the parish is situate is the appropriate Court, does the section require that the notice for that Court shall be given not less than eight days, not only before the holding of that Court, but also before the holding of whatever other Court may be held in another division in the same quarterly period? In my opinion, the section itself answers this question in the negative. It says: "It shall be lawful for the Justices, *at such sessions or any adjournment thereof*," to ascertain the average price, &c. In interpreting the words "*such* sessions" as referential, we must remember that, as the law then stood, and still stands, the Nenagh Sessions does not adjourn to Tipperary, the Tipperary Sessions could not be an "adjournment" of the Nenagh Sessions, and when the Sessions for each division, and the adjournments thereof, are mentioned, no reason can be suggested for requiring the eight days' notice for one of those Sessions to be lengthened or affected by any reference to the date of holding any other. It is consonant with the language of this Act, and with what is done in every other branch of County Court jurisdiction, that the notices served for each division should specify the place where the application is to be made, and should be given within the prescribed time for that place, without regard to any other. The notices in the present case were served for Tipperary, in time for Tipperary, and the Court held there was a proper Court of Quarter Sessions at which to make the application, and therefore, so far as the particular objection raised before us is concerned, the appellant is entitled to succeed.

But there are two matters upon which we are all anxious to be explicit, in allowing this appeal. It appears from the judgments of the Court below, and the papers before us, that seven or eight grounds of objection were originally put forward to the order in this case. We have not heard one word about any of these objections, except the one which has reference to the date of the notices, and to the jurisdiction of the Tipperary Court named in them. We do not

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even know what the other points were. We assume that they were all bad, but we decide nothing as to the order in this case, except that it was *coram judice* at Tipperary.

The other point which we reserve is also of importance. Some persons may have served similar notices for the Sessions first held in the County. We express no opinion, one way or the other, whether the Court held in the town at which the first Quarter Sessions sat, has or has not jurisdiction to deal with a notice duly served for that Court, though the parish may not be within the division. There is much to be said in favour of the view that business of this kind would be cognizable concurrently, either at the first Sessions held within the County, or at the first Sessions held within the division. *Reg.* v. *Justices of Sussex* (1) goes to show even that evidence of the practice might be given, and that there might be a custom which should be recognised on the subject. Our opinion is strictly confined to this, that the matter was properly cognizable at Tipperary, on the notice served, by the Court of Quarter Sessions first held in the division in which the whole parish was situate. Assuming the order to be right in all other respects, we allow the cause shown, and we discharge the conditional order for a *certiorari* to remove and quash the order of Quarter Sessions.

In my opinion the party who obtained the conditional order, having put the law in motion, and having failed, must pay the costs here and below.

BARRY, L.J. (2):—

I merely express my concurrence in the conclusion arrived at by the Lord Chancellor and Fitz Gibbon, L.J., though not without considerable doubt upon one question, that is, whether, irrespective of the authority of the *Sussex Case* (1), the ensuing Sessions do not commence on the first day of the first sitting for the first town, which was Nenagh? in other words, Whether, on the construction of the Act of Geo. 4, the "next ensuing Sessions" did not commence at Nenagh? Certainly, that conclusion would be

(1) 4 B. & S. 966.

(2) These notes were not revised by the late Lord Justice.—[REP.]

one leading to enormous difficulty and confusion at the present time. Where the Legislature thought it was necessary that the proceedings should be taken with regard to divisions, it always provided that the proper sitting for the case to be heard at was the session within the division, but as Fitz Gibbon, L.J., has pointed out, there were two statutes dividing Tipperary, for some purposes, at all events, into divisions. There is no evidence what the practice was which prevailed previously to these statutes, under which the business was carried on by divisions. But we may assume that, having regard to the two statutes passed before the 4 Geo. 4, c. 99, there was a practice then established of hearing these cases in proper divisions, a practice sanctioned by the Legislature, if not introduced by them. That being so, the authority of the *Sussex Case* (1) would come in, where there was a practice of that kind not established by the Legislature. It is a practice contrary to convenience, that a notice should be served for Nenagh, though the case is to be heard at Tipperary a month afterwards. Unless we are coerced to do so, we ought not to adopt such a construction. As the Lord Chancellor and Fitz Gibbon, L.J., have already stated, we decide only one point; there are several points arising in this case on the papers, but only one was argued before us. I agree with the Lord Chancellor and Fitz Gibbon, L.J., in holding that the Quarter Sessions at Tipperary had a jurisdiction in this case, and that it was a proper Court for hearing the case, if the notice was served in time for that division. On the other points we give no opinion.

WALKER, L.J.:—

Many grounds of objection are mentioned in the affidavit founding the application to the Queen's Bench Division, but here only one ground of objection was relied on, and this is all our judgment deals with. The object, substantially, of the 43rd section of 4 Geo. 4, c. 99, was to enable, on of course notice to the party interested, a variation, increase or diminution, of the tithe to be made by the Justices of the Peace at the Quarter Sessions for the Peace in the county in which the parish should be situate, or any

(1) 4 B. & S. 966.

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adjournment thereof, founded upon an ascertainment of the basis of the tithe as then existing, and with that view it makes provision (*a*) for the persons who may apply, (*b*) the giving of a notice of intention to make the application, (*c*) the mode of giving notice, (*d*) the extent of notice to be given, and (*e*) the tribunal which is to be applied to and adjudicate.

The difficulty in the case arises from the vagueness in which the tribunal is indicated in the section, viz. as I read it, the Justices at the Quarter Sessions of the Peace for the county following the notices. Mr Justice Johnson held, that the Sessions at Thurles, on the 12th October, alone had jurisdiction to hear the application, because it was the one held next after the lapse of eight days from the posting of notices on the 29th September, thus ascertaining the competent tribunal by the date of the posting of the notices, and thus it seems to me to invert the process by which the tribunal should be ascertained. We have nothing before us to show the grounds on which the Chief Justice agreed in the result arrived at, viz. that there was an absence of jurisdiction. In this Court the contention mainly was, that the words, "not being less than eight days previous to the day of holding the then ensuing Quarter Sessions for the Peace in the county in which such parish shall be situate," were plain and clear, and that, without absolutely determining that the Tipperary Sessions might not, under other conditions have jurisdiction, we should hold that notice had not been affixed eight days previous to the first sessions for the county, viz. Nenagh, which alone satisfied the words "then ensuing Quarter Sessions." They also suggested, rather than pressed, that in all cases the first Sessions would be the one having jurisdiction for the whole county in every case. I think it will be material to see how the law, as to the number of Quarter Sessions in each county, and the times at which they should be holden, and the places at which they should be held, stood in 1823, when the 4 Geo. 4, c. 99, was passed, and in 1832, when its provisions were, by reference adopted, and, finally, in 1895, when the order in question was made. In 1823, the words Quarter Sessions, had lost their original significance. The 27 Geo. 4, c. 40, had provided that General Sessions of the Peace should be holden in every county which should be divided into districts, pursuant to

that Act, eight times in every year, at the least. It specified the times, and gave power to the Lord Lieutenant to approve the towns at which they should be held. The order of the 20th July, 1787, divided the county of Tipperary into seven districts, and by the proclamation of the 13th November, 1787, the towns of Clonmel, Cashel, Thurles, and Nenagh, were made the towns at which the prescribed General Sessions should be holden.

The 36 Geo. 3, c. 25, provided for General Sessions of the Peace being held eight times in every year, *i.e.* four in each of the then two divisions of each county, and enacted that such Sessions should be good and effectual for doing all business then by law appointed to be done at the General Sessions of the Peace for every part of the said counties respectively.

The 40 Geo. 3, c. 71, passed in 1800, furnishes a remarkable instance, for in sect. 6 it enacts that it shall be lawful for the Justices of the Peace at the several Quarter Sessions held for the several districts in each county to alter rates of trespass, and the 1 & 2 Geo. 4, c. 62, passed in 1821, provided that General Sessions of the Peace should be holden in every county at large in Ireland (except Dublin) four times in the year in each of the two divisions of every such county at certain times in January, Easter, Trinity, and October, which it fixes.

So matters stood in 1823, and in 1837 the only change that I am aware of was that the 1 & 2 Wm. 4, c. 31, had slightly altered the times for holding the eight General Sessions of the Peace. I think it follows that the words "Quarter Sessions of the Peace," occurring in 4 Geo. 4, c. 99, are a general description, which, in one sense, each session for a prescribed division satisfied, each of the eight being a General Session of the Peace for the county of Tipperary, though for the particular division, and acting with full power to do all acts which might be done by law at a General Session of the Peace for a county.

The change made under the Act of 1851 and Lord Spencer's proclamation, and which was in operation in 1895, is that Tipperary became divided into four divisions for sessional purposes, one "district or division" (the words are used interchangeably) being that of Cashel, in which the towns of Cashel and Tipperary were made the towns for holding sessions, and Tipperary in October,

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1895, was the town for holding Sessions for the division, and under the Act of 1851, Tipperary was "good and effectual for the administration of criminal business and civil bill cases, and doing all other business that may by law be done at the General Quarter Sessions of the Peace."

The Juries Act of 1878 (39 & 40 Vict. c. 78) makes provision for the summoning of Grand and Petty Jurors to serve at Quarter Sessions for a division of a county. I entertain no doubt that Tipperary (all conditions of notice being satisfied) was a General Sessions having jurisdiction to hear this application, and in fact the notice was given. It is not at all necessary, in my opinion, and speaking for myself, to say it had exclusive jurisdiction. It was "good and effectual" for the purpose, to use the words of the Act of 1851. The words "Quarter Session of the Peace for the county" are the whole and its parts. Further, I think that Tipperary Sessions cannot be treated as an adjournment of the Nenagh one held in October, but as a distinct sessions, though one department of the whole. The case of *Reg.* v. *Justices of Antrim* (1) is an authority for that proposition, and in fact it is all that case decides.

Numerous instances were referred to in which in later times statutes have expressly conferred exclusive jurisdiction on the next Quarter Sessions for the "division," or "district," or "place," and no doubt it is the absence of such words which created the difficulty; but we are forced to give a construction to the general term, and when such cases arise as have been put of a parish lying partly in two counties or in two divisions, we shall have to deal with them, though it is probable the latter case would present no real difficulty.

In my opinion, we have not only ascertained Tipperary as a place having jurisdiction at the time even when the 4th Geo. 4, c. 99, passed or was adopted, but the one which by convenience and practice was the one to deal with business from Clogher parish. So far for the place of hearing. Then I think the words of the section which deal with notice should be treated as referential to the place where the hearing is to be, and adjudication made, and

(1) 8 Ir. Jur. (N. S.) 47.

all procedure leading up to that should be treated with reference to it; and it is in this view, I think, that the decision in *Reg.* v. *The Justices of Sussex* (1), and the observations of Erle, C.J., at p. 989, come in so appositely. The passage has been read by the Lord Chancellor, and I need not repeat it: I adopt its reasoning. I think it would be an unnatural construction to fix the notice by reference to Nenagh, if the place of hearing be properly at Tipperary.

I concur in deciding that there was jurisdiction to make the order there.

At the conclusion of the argument, counsel for the respondent asked that costs should not be given against the respondent, on the ground that the Court had no jurisdiction to give costs in cases of *certiorari* against the person who had obtained an order for a writ of *certiorari*. The Court directed the question of costs to be argued on a subsequent day.

Dec. 14.

T. F. Molony, for the appellant, contended that the appellant having succeeded in the appeal was entitled to costs.

R. E. Meredith, Q.C., and *Arthur Meredith*, contra

The following cases were cited:—*Re Mills' Estate* (2); *London County Council* v. *West Ham Churchwardens* (3); *Reg.* v. *Cathcart* (4); *Reg.* v. *Justices of Cork* (5); *Reg.* v. *Justices of County of Longford* (6); *Reg.* v. *Jones* (7); *Reg.* v. *Justices of County of London* (8).

(1) 4 B. & S. 966.
(2) 34 Ch. D. 24.
(3) [1892] 2 Q. B. 173.
(4) 4 L. R. Ir. 567.
(5) 28 L. R. Ir. 369.
(6) 15 Ir. C. L. R. (App.) 7.
(7) [1894] 2 Q. B. 382.
(8) [1894] 1 Q. B. 453.

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LORD ASHBOURNE, C. :—

This case has been re-entered for the purpose of deciding as to the jurisdiction of the Court to award costs in cases of *certiorari*. Since the case was argued, we have communicated by our officer with the Master of the Crown Office as to the practice of the Court of Queen's Bench in such cases, and we have received the following letter in answer :—" In answer to your note asking me to furnish, for the information of the Court of Appeal, a memorandum as to the practice of the Queen's Bench Division (Crown Side) in awarding costs in *certiorari* cases, I have to say that where a conditional order for a writ of *certiorari* is discharged, the Court in accordance with what it considers to be the well-settled English practice, has always awarded costs in such cases, as in its discretion it thinks costs should be awarded ; and the Court is not aware that its jurisdiction to do so has ever been questioned. In cases in which the conditional order for a writ of *certiorari* has been made absolute the Court formerly gave costs to the prosecutor, but recently, having regard to English decisions, the Court now holds that it has no jurisdiction to award costs to the prosecutor."

It would, I think, be a calamity if that were not the practice, and it would often work gross injustice. In *Pringle* v. *Secretary of State for India* (1), Cotton, L.J., in giving judgment, said :—" It is urged that when we dismiss the statement of claim, on the ground that it does not state any legal ground for applying to the Court, we have no jurisdiction to order the unsuccessful plaintiff to pay costs. I think that we have jurisdiction to order him to pay all the costs incurred by his asking wrongly for the interference of the Court. If the question had arisen whether we had jurisdiction to order the defendant to pay the costs of the statement of claim, if it had been successful, that would have been an entirely different question, and on that we need not give any opinion ; but as the plaintiff wrongly applied to the Court for its interference, I think that we have jurisdiction, independently of any statutory enactment, to make him pay the costs occasioned by that wrongful application."

Lord Justice Bowen said :—" I am of the same opinion. I

(1) 40 Ch. D. 288.

have always understood it to be a broad principle that a Court which is put in motion wrongly has inherent jurisdiction to compel the person who puts it in motion wrongly, and who brings an innocent party to answer an unfounded claim or an unjustifiable proceeding, to pay the costs. I have always so understood, and I believe that in my recollection this principle has been acted upon by the Court of Appeal since I have been a member of it."

In this case Mr. Creed has wrongly brought innocent parties before the Court, and in my opinion he must pay the costs of these proceedings upon the principle I have stated.

FITZ GIBBON, L.J. :—

In reality this litigation is between two individuals, one of whom—the tithe-owner—set the law in motion for the purpose of setting aside an order of the Quarter Sessions, obtained by the tithe-payer, with expense and trouble, to vary the amount of the tithe rentcharge. The promovent has been defeated, and the order of the Quarter Sessions has been upheld. Any person who sets the law in motion, and is defeated, ought to pay the costs. The immunity which the Crown enjoys, in its official or prerogative character, from paying costs in certain cases cannot be extended to an unsuccessful relator who has wrongly put the law in motion for his own purposes, even if (which I do not admit) it would protect the Crown itself from the inherent jurisdiction of the Court over an unsuccessful promovent.

BARRY, L.J., and WALKER, L.J., concurred.

Solicitors for the relator : *W. R. Meredith & Son.*
Solicitor for the tithe-payers : *Allen H. Morgan.*

R. D. M.

Q. B. Div. 1896. Nov. 12–14. 1897. Feb. 7.

BELFAST HARBOUR COMMISSIONERS *v.* COMMISSIONER OF VALUATION (1).

Rating—Exemption—Property "dedicated to or used for public purposes"—Belfast Harbour Commissioners—Poor Law (Ireland) Act, 1838 (1 & 2 *Vict. c.* 56), *s.* 63—*Valuation Acts*, 1852 *and* 1854 (15 & 16 *Vict. c.* 63, *ss.* 15, 16; 17 *Vict. c.* 8, *s.* 2)—*Statute, interpretation of.*

The Commissioner of Valuation having included the property of the Belfast Harbour Commissioners in the revised lists of rateable hereditaments for the year 1896, the Harbour Commissioners appealed to the Recorder of Belfast, who allowed the appeal, but at the request of the Commissioner of Valuation stated a Case for the opinion of the Court. Under certain local Acts the Belfast Harbour Commissioners, incorporated for the maintenance and improvement of the harbour, have vested in them the harbour and docks formerly held by a Corporation, with power to borrow money, to acquire land, and to levy tolls and duties. They have raised considerable sums on bonds, have improved and extended the harbour and docks, and maintain and light the same. Their revenue, derived from the harbour and dock rates, quayage storage and other dues, from the use of certain ferries owned by them, from rents of property and from interest on investments, is sufficient, after discharging the expenses of maintaining and improving the property held by them, and paying the interest on their bonded debt, to leave an annual surplus of considerable amount. Under a statute of 1882 their powers were further enlarged; a sinking fund was established for the repayment of borrowed moneys; and it was provided that the surplus revenue (if any) should be expended as the Commissioners might think fit in improving, or otherwise for the benefit of, the port and harbour.

Held (*per* O'Brien and Gibson, JJ., *diss.* Madden, J.), that the Court was bound by the judgment of the Exchequer Chamber in *The Londonderry Bridge Case* (I. R. 2 C. L. 577), to refuse to apply to the Irish Valuation Acts the rule of construction afforded by the decision on the 43 Eliz. c. 4, of the House of Lords in *The Mersey Docks Trustees* v. *Cameron* (11 H. L. Cas. 443); that the property of the Belfast Harbour Commissioners must be held to be "dedicated to or used for public purposes," and within the exemption of the Valuation Acts, as interpreted by *The Londonderry Bridge Case*; and that the Recorder was therefore correct in allowing the Harbour Commissioners' appeal.

Per Madden, J. (*diss.*), that, as the property of the Commissioners was not devoted to supplying ultimately a harbour to be used toll free by the public,

(1) Before O'Brien, Gibson, and Madden, JJ.

The Londonderry Bridge Case did not apply; that sect. 63 of the Irish Poor Law Act of 1838 could not be construed by reference to erroneous English decisions then current but since overruled; and that the property of the Commissioners was not within the exemption from rating of section 63, whether construed upon its own terms in their ordinary acceptation or interpreted in the light of *The Mersey Docks Trustees* v. *Cameron*.

CASE STATED, for the opinion of the Court, under the provisions of 23 Vict. c. 4, by His Honor the Recorder of Belfast (H. Fitz Gibbon, Esq., Q.C.), on the hearing before him, at the Trinity Quarter Sessions of the Peace, 1896, of an appeal, pursuant to sect. 22 of the Valuation Act, 1852, against the decision of the Commissioner of Valuation, who had included in the Valuation Lists for that year, and had refused to distinguish as exempt, the property of the appellants, the Harbour Commissioners of Belfast.

The accounts of the Harbour Commissioners for the year 1895, which were referred to and incorporated in the Case, and were to be taken as indicating as well the mode of user of the premises for which exemption was claimed as the source of the income of the Harbour Commissioners and the manner in which it was expended, showed a gross revenue for that year of £139,190 12*s.* 11*d.*, and a net surplus revenue of £10,848 2*s.* 1*d.* The receipts for the year included rates on goods, tonnage and quayage dues, charges for porterage storage and cranage, income derived from harbour tramways weigh-bridges and steam ferries, rents of property, and interest on money. The expenditure included harbour maintenance, wages and working expenses, lighting and sweeping quays and streets, harbour lighting and harbour police, rates and taxes and income tax, superannuation allowances, interest on loans on bond and consolidated stock, and on loans from the Board of Public Works, and the amount transferred to the sinking fund under the Belfast Harbour Acts of 1882 and 1893. The accounts showed that during the year very considerable sums had been expended in the acquisition of new property, and in the extension and reconstruction of docks and quays.

The Case referred to the Act incorporating the Harbour Commissioners (The Belfast Harbour Act, 1847, 10 & 11 Vict. c. lii.), and the later Acts dealing with and extending the powers of that

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body, namely, The Belfast Port and Harbour Conservancy Act, 1852 (15 & 16 Vict. c. cxxxi.), The Belfast Dock Act, 1854 (17 & 18 Vict. c. xlv.), The Belfast Harbour Act, 1870 (33 & 34 Vict. c. xcvii.), The Belfast Harbour Commissioners Act, 1871 (34 & 35 Vict. c. xli.), The Belfast Harbour Act, 1882 (45 & 46 Vict. c. clxxi.), The Belfast Harbour Act, 1882 (46 & 47 Vict. c. lix.), and the Belfast Harbour Act, 1893 (56 Vict. c. lxiv.) (1).

The Case then stated that previously to 1895 the property of the Harbour Commissioners had been distinguished in the Valuation Lists as being of a public nature, and accordingly exempt from all assessment for the relief of the poor and for Grand Jury and county rates; that in October of that year the Clerk of the Belfast Poor Law Union had included this property, so far as same was within that Union, in the list transmitted by him to the Commissioner of Valuation of property the valuation of which required to be revised; that thereupon the Commissioner had transferred same to the revised general lists of rateable hereditaments and tenements, and fixed the annual rateable value thereof at £34,000, overruling the objection of the Harbour Commissioners, that the property should be allowed to remain upon the list of property exempt from rating; that the Harbour Commissioners had appealed to Quarter Sessions; that the learned Recorder, having heard counsel for the appellants, for the respondent, and for the guardians of the Belfast Union, allowed the appeal and ordered the lists to be amended accordingly; that in taking this course he followed the decision of Mr. Otway (Recorder of Belfast), who on two occasions (2) had held that the Harbour of Belfast was exempt from rating as being used for public purposes, and of Sir Frederick Shaw, Recorder of Dublin, who had held that the property of the Dublin Port and Docks Board was exempt on the same ground, thus placing the Commissioner of Valuation in the position in which he was after Mr. Otway's decisions in 1869 and 1870, when he might have taken the case for the opinion of the Superior Court, but did not. On the requisition of the Commissioner of Valuation the Recorder now

(1) The material provisions of these Acts are summarised in the judgment of Madden, J.

(2) See 4 Ir. L. T. 533.

stated this Case for the opinion of the Court on the question, "Are the hereditaments the property of the Belfast Harbour Commissioners, which are specified in the schedule to the notice of appeal set out in the schedule hereto, hereditaments of a public nature within the meaning of 17 Vict. c. 8, sect. 2?"

J. F. Vesey Fitzgerald (*The Attorney-General, the Right Hon. J. Atkinson, Q.C.*, with him), for the Commissioner of Valuation. They contended that there was here a beneficial occupation within the English authorities, from *The Mersey Docks Case* (1) onward. That case, and the later decisions of the House of Lords, the most recent of which was *The London County Council* v. *Overseers of Erith* (2), could not be disregarded; the exemption sections of The Poor Law Act of 1838, and the Valuation Acts of 1852 and 1854, could not be interpreted by erroneous decisions then current in England. It must be taken that the law in England then was what it now is, and the strong current of English decision since the date when the judgment in the *Londonderry Bridge Case* (3) was pronounced, justified the Court in considering the matter anew. But, even assuming that the *Londonderry Bridge Case* (3) was binding on the Court, and must be followed where similar circumstances were found to exist, still the facts of the present case distinguished it therefrom. The bridge was a highway open to all and designed ultimately to be toll free. The harbour of Belfast could be and was utilised only by a section of the community, and the "sinking fund" was only applicable to the bond debts of the Commissioners, not to the reduction of any of the tolls or charges set out in the accounts incorporated in the case. The immense income of the Commissioners was expended not merely in the improvement of the port, but in the erection of new works, the purchase of additional lands, and the reclamation of waste ground. A large revenue was derived from ferries, &c., which could in no sense be called a public service, and a very considerable net income remained year after year in the disposition of which the Commissioners had the widest powers. There was a beneficial occupation

(1) 11 H. L. Cas. 443. (2) [1893] A. C. 562. (3) Ir. R. 2 C. L. 577.

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in respect of such property which brought the case within the principle on which the *Londonderry Bridge Case* (1) was distinguished in *The Mayor of Limerick* v. *The Commissioner of Valuation* (2).

A. H. Bates, and *John Gordon, Q.C.* (*J. H. Campbell, Q.C.*, with them), for the Harbour Commissioners, argued that the property of the Commissioners should be distinguished on the Valuation Lists as exempt from poor rates as being "dedicated to or used for public purposes" (1 & 2 Vict. c. 56, s. 63; 17 Vict. c. 8, s. 2). They relied on the preambles and provisions of the local Acts dealing with the harbour and docks as showing that the purposes of the Commissioners were public purposes, and that the harbour and property held in connexion therewith were used exclusively for the benefit of the whole community. The Commissioners were simply trustees for public purposes with no beneficial interest in the property held by them. The provision of the local Act of 1882, creating a sinking fund, brought the case completely within the authority of *The Londonderry Bridge Commissioners* v. *The Commissioner of Valuation* (1), where the Irish Court of Exchequer Chamber refused to apply to the Irish Poor Law Code the principles laid down in the House of Lords in *The Mersey Docks Trustees* v. *Cameron* (3) as governing the interpretation of the English Statute of Elizabeth. The Irish Acts must stand apart, and if English decisions on the English Poor Law were to be applied to their construction, the reference must be to cases prior to 1838, and to the law as it then stood, and not to later pronouncements, by which the limits of exemption had been substantially narrowed.

The Attorney-General, in reply.

[The numerous authorities cited during the arguments are fully discussed in the judgments of the Court.]

Cur. adv. vult.

(1) Ir. R. 2 C. L. 577. (2) Ir. R. 6 C. L. 420. (3) 11 H. L. Cas. 443.

MADDEN, J. :—

This case raises the important question of the liability of property vested in the Belfast Harbour Commissioners to be rated for the relief of the poor, and to be entered accordingly in the lists prepared under the Valuation Acts. In making out these lists, it is the duty of the Commissioner of Valuation, under 17 Vict. c. 8, sect. 2, to distinguish all hereditaments and tenements of a public nature (amongst others); and the same section provides that "all such hereditaments or tenements, so distinguished, shall, so long as they shall continue to be of a public nature, and occupied for the public service, or used for the purposes aforesaid, be deemed exempt from all assessment for the relief of the destitute poor in Ireland, and for Grand Jury and County rates."

It appears that the property of the Commissioners had been in former years so distinguished, in consequence of a decision of Mr. Otway, then Recorder of Belfast. In the Revised List, made out by the Commissioner of Valuation for the year 1896, the property of the Commissioners was transferred from the special list to the general list of rateable hereditaments. The question of the liability of this property was brought before Quarter Sessions, by appeal under the provisions of the Valuation Act of 1852. The Recorder, who was the only Justice sitting at Quarter Sessions, allowed the appeal, following the decision of his predecessor, and, on the requisition of the Commissioner of Valuation, he has stated a Case, submitting for our decision the question "whether the hereditaments, the property of the Commissioners, are hereditaments of a public nature, occupied for the public service, within the meaning of 17 Vict. c. 8, section 2."

Although the question for our decision was raised under the provisions of the General Valuation Act, and is properly so submitted by the learned Recorder, the answer to that question depends mainly upon the construction of the 63rd section of the Poor Law Act of 1838, 1 & 2 Vict. c. 56, which exempts from liability to rates for the relief of the poor, "any building land or hereditaments dedicated to or used for public purposes." This appears clearly from the judgment of the majority of the Court of Exchequer Chamber in *The Guardians of the Londonderry Union*

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v. *Londonderry Bridge Commissioners* (1). The Valuation Acts provide a machinery for valuing property for purposes which are not confined to Poor Law assessments, and they leave the question of liability to poor rate to be decided by the statute by which that imposition was created. "There may be meanings," Baron Fitzgerald remarks, at p. 597, "in which the term, 'hereditaments dedicated to public purposes' will be more exclusive than the term 'hereditaments of a public nature'"; but he thus continues:—"I know of no authority for construing the language of a provision in one statute by the different language in the provision of another, so as to make property not liable under the one provision liable by mere implication under the other."

Thus it appears that the question for our decision is, whether the property of the Commissioners is "dedicated to or used for public purposes" within the meaning of 1 & 2 Vict. c. 56, sect. 63. In order to answer this question it is necessary, in the first instance, to ascertain the purposes for which this property is used, and to which it is dedicated, under the provisions of the statutes by which the Commissioners were created, and under which they administer their property.

I do not think that it is necessary to examine these numerous Acts in detail, for their general relation to the public may be shortly summarised. The Commissioners are incorporated by the Belfast Harbour Act (10 & 11 Vict. c. lii.), the object of which is recited as the further improvement of the Harbour of Belfast, and the affording of additional accommodation to vessels frequenting the same. In order to enable the Commissioners to effect these purposes, certain property, formerly vested in the Corporation, was transferred to them, and they were given power to acquire land, to borrow money, and to levy certain rates, tolls, and duties. The masters of all vessels, with certain defined exceptions, are made liable to tonnage, dock, and quay duties; and, in addition, the Commissioners are empowered to levy, on all vessels entering, using, or departing from, the port, certain scheduled rates and duties upon all imported and exported goods and commodities (sect. 79).

(1) Ir. R. 2 C. L. 577.

The application of the moneys received by the Commissioners is prescribed by the 72nd section. After payment of certain outgoings, and of the interest on loans, it is to be applied, "fourthly, in defraying the accustomed expenses of keeping the said harbour in repair, independent of the new works to be executed in pursuance of this Act; and, fifthly, in making and improving the said channel, docks, ponds, quays, and the several other works thereunto belonging, by the said Act and this Act authorised, and keeping the same in repair, or otherwise in carrying this Act into execution."

It appears from the preambles and provisions of subsequent Acts that the Commissioners acquired considerable real estate, now valued at £34,000, in regard to which certain duties are imposed upon them. By the Belfast Dock Act of 1854 (17 & 18 Vict. c. xlv.), they are required to set aside not less than fifty acres for the purposes of a public park (sect. 20), and to grant a site for a marine school (sect. 21). But, subject to clearly defined statutory obligations, the hereditaments vested in them were held for the general purposes of the Commissioners, as prescribed by their several Acts.

An important Act was passed in 1882 (45 & 46 Vict. c. clxxi.), providing for the execution of additional works, conferring new borrowing powers upon the Commissioners, and establishing a sinking fund for the repayment of the borrowed moneys. The 57th section of this Act provided for the ultimate application of the harbour revenues in the following words:—"The surplus, if any, shall be expended, as the Commissioners think fit, in improving, or otherwise for the benefit of, the port and harbour."

Thus it appears that the hereditaments with which we have to deal constitute corporate property, held by the Commissioners for purposes of great public utility. Any member of the public requiring to make use of the harbour can do so, but only upon payment of the tolls and charges which the Commissioners are empowered to levy under their Acts. The property of the Commissioners is certainly not "used for public purposes," in the ordinary acceptation of these words. It is used by members of the public for their private purposes—purposes of trade, commerce, and navigation. But, since the decision of the Court of Exchequer

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Chamber, in *The Guardians of the Londonderry Union* v. *The Londonderry Bridge Commissioners* (1), it must be taken as settled law that property dedicated to the use of the public, free of charge is within the exemption section of the Poor Law Act, although the actual user by individual members of the public may be for purposes of private profit or convenience.

The question in that case was the liability of the Londonderry Bridge Commissioners to be rated to the relief of the poor in respect of certain tolls and toll-houses vested in them under the Londonderry Bridge Act of 1859 (22 Vict. c. vii.). This Act directed the tolls to be applied, first, in payment of the costs of the Act; secondly and thirdly, in payment of an annuity, and in watching and lighting the bridge; fourthly, in payment of interest on moneys borrowed under the Act; fifthly, in forming a sinking fund for payment off of the moneys so borrowed; and, lastly, the Act directed that the residue of the tolls should be invested from time to time, and applied in the formation of a fund to meet the annual expenses connected with the bridge, to the end that it might become toll-free.

The Court of Exchequer Chamber held, by a majority, that the tolls and toll-houses fell within the exemption of hereditaments "dedicated to or used for public purposes," reversing the decision of the Court of Queen's Bench (2). The ground of this decision appears from the following passages from the judgments of Monahan, C.J., and O'Hagan, J. "Now what is the object of all this? It is to establish a bridge toll-free for all her Majesty's subjects—I confess I should say clearly a public purpose": *per* Monahan, C.J. (3). "On the whole, therefore, if we had to deal only with our Irish Legislation, the conclusion seems to me irresistible that a bridge, found to be 'a public highway, open to and used by all her Majesty's subjects,' is a bridge 'dedicated to public purposes,' and exempt from liability to poor rate. And I do not think it the less exempt because one of the purposes for which its tolls are levied is the payment of interest on moneys expended on its maintenance and erection, and the ultimate liquidation of the principal, so that it may become toll-free. Although the indi-

(1) I. R. 2 C. L. 577. (2) I. R. 1 C. L. 283. (3) I. R. 2 C. L. 598.

vidual mortgagees receive their interest, the mortgages were executed, and the interest is paid for a public purpose—the purpose of securing to the community a toll-free bridge": *per* O'Hagan, J. (1).

The ground of that decision is, to my mind, clear and distinct. The ultimate purpose for which the tolls were exacted was the provision of a bridge available for the use of the public, toll-free. Property may fairly be regarded as dedicated to the use of the public, if it, or property which it produces, can be enjoyed and used by the public free of charge; and, if any similar element could be found in the present case, I should treat it as governed by the authority of that decision. It is not desirable in the interests of the administration of Justice that decisions of appellate tribunals should be frittered away by subtle distinctions, founded on unsubstantial differences. But the distinction between property enjoyed toll-free by the public, and property for the user of which they are compelled to pay, is, to my mind, a real and substantial one, going to the very root of the decision of the Court of Exchequer Chamber; and I cannot regard that authority as governing the case now before us.

Counsel for the Commissioners do not rest their argument upon that case alone. They contend that the 63rd section of the Irish Poor Law Act cannot be construed as an independent enactment, and that it must be considered in the light of the English decisions upon the 43 Eliz. c. 4, which is still the governing statute in England. I have no doubt that the exemption now under consideration was introduced into the Irish statute in order to render the law in the two countries uniform, by condensing into a single sentence the Judge-made law which was supposed to be in force when the Irish Act was passed. As an effort towards uniformity and accuracy, it has proved singularly unsuccessful. It has been convicted of misrepresenting the English law by the decision of the House of Lords in the *Mersey Docks Case* (2); and it has proved the cause of the divergence between the law of England and that of Ireland, resulting from the decision in the *Londonderry Bridge Case* (3). The latter case has clearly established

(1) I. R. 2 C. L. 587. (2) 11 H. L. Cas. 443. (3) I. R. 2 C. L. 577.

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that a dedication to and user for purposes other than the service of the State may be sufficient to constitute a claim for exemption under the Irish Act, while the former has, with equal clearness decided that no property in England is exempt from rateability, unless it is occupied for the purposes of the public service.

But, although this is now the law in England, counsel for the Commissioners contend that it was not so in 1838, and they ask us to construe the words of the Irish Act in view of certain decisions which they allege to have been then in force, although since overruled. Now I cannot adopt the principle of construction upon which this argument is founded. No doubt where terms of art, or phrases which have acquired a defined legal meaning, are used in a statute, they receive a construction in accordance with their technical use. But, where a statute uses such vague and indefinite language as "dedicated to, or used for public purposes," I cannot think that it incorporates and stereotypes certain erroneous decisions which were current at the time, even though they may have been present to the minds of the framers of the section. If the Irish statute were to be construed with reference to the English Act, it should be so construed in the light, not of overruled cases, but of the ultimate decision of the House of Lords, establishing conclusively what must be taken to have been always the law in England.

The English Poor Law Act, 43 Eliz. c. 4, contained no exemption of property dedicated to public purposes. It provided for the taxation of every "occupier." But a long series of cases established that, where property was occupied for the purposes of the government of the country, no one was rateable in respect of such occupation. The principle of beneficial occupation was carried much further, and, in several cases, where the occupation was for public purposes, or for purposes of general utility, unconnected with the government of the country, it was held that property so circumstanced was exempt from rateability. These cases were fully considered and overruled by the House of Lords in *The Mersey Docks Trustees* v. *Cameron*, and *Same* v. *Jones* (1), the effect of which was thus summarised by Lord Herschell in *The London*

(1) 11 H. L. Cas. 443.

County Council v. *Churchwardens of Erith* (1):—"The decision of this House in *Jones* v. *Mersey Docks* (2), marks an epoch in the law of rating. Many of the earlier decisions are tainted with this vice, that they proceed upon the supposition that lands held for public purposes are, on that account, not rateable. This doctrine is now exploded, your Lordships' House having distinctly determined that the circumstance that land is held by a public body for public purposes does not affect its rateability."

But, even if I could adopt the principle of construction contended for, the argument which I am now considering appears to me altogether to fail. I can find no case decided before the year 1838 in England, in which any clear principle was laid down applicable to the present case. The various decisions on the Statute of Elizabeth, up to the year 1845, are reviewed by the Court of Queen's Bench in *The Queen* v. *Badcock* (3). Lord Denman, in delivering the judgment of the Court, observes that, in all the cases where the occupation was held to be of such a public nature as to exempt the property from rateability, "the public as such, unlimited by the bounds of county, borough, or parish, had a direct interest in the benefit which the application of the funds produced." This statement is criticised by Mr. Justice Blackburn in delivering the opinion of the majority of the Judges in the *Mersey Docks Case* (2). He points out that the principle thus laid down cannot be made to embrace either *The King* v. *The Trustees of the Weaver Navigation* (4), where the funds were applicable to the relief of the county rate of Cheshire, or *The Queen* v. *The Mayor of Liverpool* (5), where the funds were brought into the borough fund in relief of the borough rate in that particular borough. There are other cases, such as *The King* v. *The Inhabitants of Liverpool* (6), to which Lord Denman's general observation appear applicable. But minute criticism of these overruled cases appears to be of little value. They were conversant with the question of occupation under the English Act. No doubt the decision of this question involved the consideration of the rateability

(1) [1893] A. C. at p. 585.
(2) 11 H. L. Cas. 443.
(3) 6 Q. B. 787.
(4) 7 B. & C. 70 *n.*
(5) 9 A. & E. 435.
(6) 7 B. & C. 61.

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of property held for public purposes. But I cannot find any interpretation of the words under consideration, so clearly established by the older authorities as to compel us to construe the Irish Act in the light of these overruled cases, even if such a principle of construction were admissible.

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The result is that the 63rd section of the Act of 1838 must be construed as a substantive enactment, according to the ordinary meaning of the words used, and in obedience to settled rules of construction, in the light of the governing decision in Ireland—the *Londonderry Bridge Case* (1). If the property of the Commissioners were devoted to supplying ultimately a harbour to be used toll-free by such of the public as required accommodation of the kind, that authority would rule the present case. But the distinction between property used toll-free by the public, and property for the user of which they are compelled to pay, appears to me to be an essential one, and to have formed the ground of the decision of the majority of the Court of Exchequer Chamber in the *Londonderry Bridge Case* (1).

For these reasons I am of opinion that the property of the Commissioners is not dedicated to, or used for public purposes, within the meaning of the Irish Act.

GIBSON, J.:—

The harbour authorities of the Clyde and Mersey are rateable. Why should the wealthy harbour of Belfast be exempt, and the burthen on the rest of the local community be thereby increased? The answer depends on the intention which Parliament has thought fit to express. For myself I can discern no reason for making any distinction in this respect between Ireland and the other members of the United Kingdom.

The point turns on the construction of the Valuation Acts. Valuation is required for the purposes of public and local assessments, as well as for Poor Law purposes, and there were Valuation Acts—such as 7 Geo. 4, c. 72; 2 & 3 Wm. 4, c. 73; and 6 & 7 Wm. 4, c. 84—in existence before the year 1838, when the first real Poor

(1) I. R. 2 C. L. 577.

Law Act was passed—for earlier statutes such as 11 & 12 Geo. 3, c. 30 (Ir.), hardly require notice. In three broad particulars the general valuation code differs from section 63 of the Poor Law Act, which, however, resembles 6 & 7 Vict. c. 32, section 1, as to Grand Jury Municipal Presentments. First, as regards charities, the general words of exemption in section 63 are confined to buildings used for charitable purposes, while the Valuation Acts extend to hereditaments generally. Secondly, the section relates to hereditaments used for public purposes, not saying *exclusively* so used. The Valuation Statutes confine exemption to premises *altogether* of a public nature—an expression occurring as far back as the Valuation Act, 2 & 3 Wm. 4, c. 73. Thirdly, the Act, 17 Vict. c. 8, sect. 2, introduces "occupation for *the* public service" as a necessary condition to exemption.

The judgments of the majority in the Exchequer Chamber in the *Derry Case* (1) are founded on the interpretation of the 63rd section, and only one of the Judges, O'Hagan, J., purports to decide the construction of the Valuation Acts. The other three Judges did not, however, indicate any disapproval of his opinion, which was adopted by Barry, J., in *The Mayor of Limerick* v. *The Commissioner of Valuation* (2). I therefore feel bound to accept the *Derry Case* (1) as a binding authority in reference to the Valuation Statutes.

That case, explained and followed in the *Limerick Case* (2), decides two points—First, that public purposes extend beyond governmental purposes, within which exemption in England and Scotland is confined; second, that such purposes mean purposes in which all members of the community are interested, and not purposes for the benefit of individuals, a class, or a locality. An objection was there made, but not pressed, as to the valuation not having been appealed from, but nothing was said as to the rate itself not having been the subject of appeal. The decision seems to involve that, in an action for an unappealed rate good on its face, effect can be given to a statutory exemption by way of defence. In England such exemption apparently can only be set

(1) I. R. 2 C. L. 577.
(2) I. R. 6 C. L. 420, at p. 435.

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up by appeal: *Birmingham Churchwardens* v. *Shaw* (1), followed in *Murphy* v. *Lyons* (2). The cases in which non-occupation was held to be a legal defence are founded on the want of jurisdiction in that event to rate: *Milward* v. *Caffin* (3); *Headlam's Case* (4).

The expression "public" frequently occurs in statutes, and must be interpreted according to the policy and context of the particular legislation. Thus "public place," "public school" (*Blake's Case* (5)), "public charity," have been the subject of decision. In some instances the Act itself contains a definition, as in 23 & 24 Vict. c. 97, s. 5, relating to malicious injuries to public buildings; but, upon taxing legislation at all resembling that before us, I have not found any authority which gives much help. There is a case, *Essenden* v. *Blackwood* (6), where the Court in Victoria held that a racecourse was "used for public purposes," and was therefore not rateable. The decision—which was reversed on appeal—illustrates the dangerously elastic nature of the phrase. In interpreting "public nature," or "public purposes" in our statutes, we no longer stand on the secure foundation afforded by the House of Lords' authority, and can only look to the uncertain guidance of conflicting decisions where the phrase bears an expanded or contracted meaning with the varying impulse of judicial opinion.

At the time the Valuation Act, 2 & 3 Wm. 4, c. 73—which contains the first exemption of hereditaments of a public nature, or used for charitable purposes—was passed, there had been a number of decisions exempting from liability—(*a*) property occupied by the Crown or for purposes of government; (*b*) property of which the public at large, but no individuals, might be described as occupiers; (*c*) public hospitals and almshouses; (*d*) places of public worship where there were no pew rents; but buildings used for general religious purposes were not free: *Baptist Missionary Case* (7); (*e*) property occupied for what was called "public

(1) 10 Q. B. 868.
(2) 9 Ir. Jur. (N. S.) 345.
(3) 2 Wm. Bl. 1330.
(4) 21 Q. B. D. 96.
(5) 19 Q. B. D. 79.
(6) 2 App. Cas. 585.
(7) 10 Q. B. 884.

purposes." All these several classes of exemption, save the first, might be referred to the principle that there was no individual occupation, or that the occupation, if any, was formal, and without individual benefit, it being at that time supposed that occupation of a purely fiduciary character was not of benefit, and was not rateable.

As this Judge-made law all rested upon the interpretation placed on an ancient statute, it may have been considered convenient by the Legislature when enacting the Irish Valuation Acts—such as 2 & 3 Wm. 4, c. 73, and 6 & 7 Wm. 4, c. 84—and the Poor Law Act of 1838, to specify in express terms for the information of all concerned the various categories of exemption supposed to be already established, with the addition of some new ones appropriate to the peculiar circumstances of Ireland. Accordingly, O'Hagan, J., in the *Derry Case* (1), and Barry, J., in the *Limerick Case* (2), treat the earlier English decisions as in point upon the construction of our Irish legislation. It is, however, to be observed that, in the Scotch Valuation Act of 1854, Parliament did not deem it necessary to make any statement in reference to Scotch hereditaments then supposed to be exempt.

Three difficulties at once face us when we attempt to read "public purposes" in our statutes by the wavering light supplied by English Case law. First, the decisions allowing exemption in favour of subjects whose occupation cannot be referred to purposes of State, all proceeded on a complete misunderstanding of the statute of Elizabeth, and of the true principle of immunity. Secondly, the *ratio decidendi* of many of the cases is not so much public purposes as that there was no individual or beneficial occupation; and thirdly, long before the *Mersey Docks Case* (3) the authorities were already in irreconcileable conflict. Some of them are quite inconsistent with the limitation adopted in the Irish cases. Thus, in the *Liverpool Corporation Case* (4) dues payable to the borough fund for the benefit of the inhabitants—a local purpose—were held to be dedicated for public purposes,

(1) I. R. 2 C. L. 577.
(2) I. R. 6 C. L. 420.
(3) 11 H. L. Cas. 443.
(4) 9 A. & E. 435.

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and as such to be rate free. But for the opinions expressed by O'Hagan, J., and Barry, J., I should therefore, like Mr. Justice Madden, find it difficult to accept the guidance of the early English decisions in determining the meaning of "public purposes," or "public nature" in our legislation.

The origin of the immunity founded on "public purposes" is said to be the marginal note to the *Salter's Load Sluice Case* (1). The case was decided on the ground that there was a bare trust, and that no interest resulted after the public purposes of the special Act were answered. The tolls were directed to be applied for the purposes of the special Act, and to no other use or purpose whatsoever. There was no provision for lowering such tolls. This authority was followed by Lord Tenterden in the *Liverpool Docks Case* (2) as binding. The *ratio decidendi* apparently was that the special Act specifically directed the appropriation of the rates, and that there was no individual beneficial occupation. The Act there required the rates to be reduced, but not extinguished. Nothing was said in the judgment about public purposes. Both these cases are explained in the *Wallingford Case* (3), as referable to the principle that fiduciary occupation was not rateable, and that the public might be said to be the occupier. In *Rex* v. *Perrott* (4) the phrase "public duty" makes its way into the judgment; and "public purposes" are the ground of decision in the judgment in the *Weaver Case* (5), where the surplus was to be expended in repairing public bridges and highways within the county—a purpose from which the local ratepayers received special and direct benefit. In none of these cases was it suggested that the power to charge tolls raised any difficulty.

Uneasiness seems to have been felt at the dangerous growth of exemptions of this indefinite class; and, in *Badcock's Case* (6), Lord Denman drew a distinction between cases where the public, as such, unlimited by locality, had a substantial and direct interest in the benefit resulting from the particular funds—where the exemption would, he thought, be right—and cases where the ratepayers or inhabitants of certain parishes were alone concerned—

(1) (1792) 4 T. R. 730.
(2) (1827) 7 B. & C. 61.
(3) 10 A. & E. at p. 279.
(4) (1803) 3 East, at p. 513.
(5) (1827) 7 B. & C. 70.
(6) (1845) 6 Q. B. 787.

where the exemption would be wrong. To the first class he treats the *Liverpool Case* (1) as clearly belonging, and he makes no reference to the fact that the tolls there were required to be reduced. The same distinction was adopted in the *Harrogate Case* (2).

The disfavour to exemption continued to increase; and, in the *Birkenhead Case* (3), Lord Campbell got free from the earlier cases in 4 *Term Reports* and 7 *Barnwall and Cresswell*, by the explanation that they were decided on special Acts, which appropriated the tolls in a way that made it illegal to rate them. This explanation—founded, perhaps, on a reminiscence of Serjeant Talfourd's argument in the *Wallingford Case* (4)—is not consistent with the interpretation placed on those cases by Lord Denman, and was rejected in the *Mersey Docks Case* (5).

A further and more drastic formula of restriction was put forward in the *Tyne Case* (6), viz., that property occupied for government purposes could alone enjoy immunity. This was the ground of decision adopted by Lord Campbell. Wightman, J., thought that, after paying all charges, there might remain a surplus for general purposes. Crompton, J., held that the purposes only benefited a section of the community, and considered that his view could be in some way reconciled with the *Liverpool Case* (1). I think that it is in direct conflict with that case as understood and explained by Lord Denman.

This decision was approved of in the *Mersey Docks Case* (5) on the ground taken by Lord Campbell. Since the House of Lords' decision the principle that the statute of Elizabeth applies to all subjects not occupying for the purposes of the Crown or the State, has been inexorably applied; and, accordingly, where the occupation is of value, parks, reformatories, county lunatic asylums, hospitals, and County Council buildings used for administrative purposes, have been held to be rateable.

In Ireland, since the *Londonderry Case* (7), we stand on a slippery slope, and we must interpret our statutes as best we may

(1) 9 A. & E. 435.
(2) 15 Q. B. 1012.
(3) (1852) 2 E. & B. 148.
(4) 10 A. & E. 265.
(5) 11 H. L. Cas. 443.
(6) (1859) 1 E. & E. 516.
(7) I. R. 2 C. L. 577.

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with the assistance of the Irish decisions, which do not define public purposes, but lay down that they must not be confined to a class or locality.

There is some difficulty in discriminating between cases where all members of the public are alike interested, and cases where there is a special and direct interest in a particular portion of the community. What is advantageous to the State as a whole is usually connected with some special benefit to a particular section or place. A public bridge, as at Derry—a public park, like St. Stephen's-green—an industrial school—all subserve a public purpose; but the city, the county, the province, derive a peculiar benefit. Might not the same be said of a sea-wall, such as that at Lynn, referred to in the opinion of Park, J., in 2 Cl. & Fin., at page 352 (1)? Would a poorhouse, which, according to the *Wallingford Case* (2), would be rateable in England as a local institution for local benefit, come within the principle of the *Limerick Case* (3)? or a county lunatic asylum?

Prima facie, a port, as a matter of national or imperial concern, would be ranged more naturally under the *Derry Case* (4) than under the *Limerick Case* (3). The rateability of the harbour authority here must be rested on one of four different possible grounds: 1. The liability to pay off the borrowed capital and interest on the view suggested by Blackburn, J., in the *Mersey Docks Case* (5); 2, the right to levy dues; 3, the fact that only a section of the community derives benefit; 4, the fact that there is no provision for reducing tolls, and the application of any surplus is left to the discretion of the Commissioners.

In the consideration of these several topics, the *Derry Case* (4) is more or less in point. There, under the special Act, the Bridge Commissioners had powers of borrowing, of compulsory purchase with liberty to sell lands not required, of charging and varying tolls, and leasing such tolls. There were special provisions for reducing tolls; but it was manifest that they might be required for an indefinite period for the maintenance, &c. of the bridge and the payment of a perpetual charge of £18 9*s.* 2*d.* to the Irish Society,

(1) *Mayor of Lyme Regis* v. *Henley*.
(2) 10 A. & E. 265.
(3) I. R. 6 C. L. 420.
(4) I. R. 2 C. L. 577.
(5) 11 H. L. Cas. 443.

therein specifically provided for. The provisions of the special Act show that the *Derry Case* (1) is a conclusive authority against the first two points.

1. To make the bridge, borrowed capital was necessary. Similarly, the shallow and muddy estuary of the Lagan could not be converted into a harbour with berths, quays, and equipment, without the aid of loans.

2. As to the right to take tolls from those using the harbour, it might, before the *Derry Case* (1), have been possibly argued that public purposes, which the statutes associate with charities, were limited to purposes of a gratuitous character, such as, in addition to government purposes, public parks, gardens, and recreation grounds, free to the public at large. But the power to raise a revenue is necessary to secure repayment of borrowed capital and interest; and the *Derry Case* (1), following the earlier English cases, decides that a statutory power of charging tolls is not inconsistent with the purposes and property being of a public nature.

There the statement in the special case was: "It (the bridge) is a public highway open to and used by all Her Majesty's subjects on payment of toll." The Act, no doubt, contemplated that at some future time the bridge should, if possible, be toll free; but this object could only be attained by making the toll higher than was necessary for maintenance and repair, and thus taxing the present generation for the benefit of posterity, the tax being made more onerous by the bridge property itself being exonerated from contribution to rates. If the Belfast Acts had in view a similar object, to make the port free by raising a sinking fund at the expense of those now using the port, would that make any difference? Furthermore, the toll might have been protracted for an indefinite period if the bridge was injured by some casualty. In rating what is considered always is the existing position of affairs, and not some contingent state of facts in the future. Thus, in the *Blackfriars Bridge Case* (2), Littledale, J., a great authority, puts the case of a person who builds a bridge on his land for the public benefit, and who, to reimburse himself, procures an Act to enable him to take toll. The land, he says, would be beneficially

(1) I. R. 2 C. L. 577. (2) 9 A. & E. 828.

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occupied so long as the toll was taken; but, when the debt was paid, the toll would cease and the bridge then become public and free. His opinion agrees with that of Fitzgerald, J., in the *Derry Case* (1), and with that of the Australian Court in *Hanna* v. *Seymour Road Board*, cited with approval by the Privy Council in *Mayor of Essenden* v. *Blackwood* (2).

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3. Is the harbour property held for the benefit of a section of the community? Every port is of exceptional advantage to sailors, merchants, and the local community; and this harbour can only be enjoyed by those able to pay the prescribed dues. Similarly the Derry Bridge was of special utility to those in the neighbourhood, and could only be used by persons able to pay the toll. Ports at common law are a branch of the Royal Prerogative; and just as the mouth introduces aliment for the body, ports are the avenues by which food and wealth are brought to the State. That a particular port is governed by statute, and vested in a county by its Grand Jury, or in Commissioners as here, ought not *prima facie* to alter its public character and function.

The Valuation Code places hereditaments used for charitable purposes in the same position as hereditaments of a public nature, and confers upon them the same immunity. There may be a valid public charity confined to a particular sect or a particular locality, and such a charity would fulfil a "public purpose": see Succession Duty Act, 1853, sect. 16, and *Dolan* v. *Macdermott* (3). It is not necessary to discuss what "charitable purposes" may mean in section 63 of the Poor Law Act, where the expression follows a detailed enumeration of religious and other objects specifically provided for. In the Valuation Act, 17 Vict. c. 8, the exemptions are grouped under three heads, and charity must include religion. If the wide interpretation adopted in *Pemsel's Case* (4) applies, the repair of a port, a haven, a bridge, &c., specified in the English statute, 43 Elizabeth, c. 4, and the paving, lighting, and improvement of a town, would fall within charitable purposes. This might suggest an argument that, if property given for the improvement of a port or town would be dedicated to charity, and therefore excluded from rate, by the voluntary action

(1) I. R. 2 C. L. 577.
(2) 2 App. Cas. at p. 585.
(3) L. R. 3 Ch. 676.
(4) [1891] A. C. 531.

of a private donor, in the same way property acquired by purchase or otherwise for the same purpose might be deemed to be of a public nature and also free. The Irish decisions, however, make it impossible to adopt such an argument. Nevertheless, the statutory association of charitable purposes with purposes of a public nature, cannot, having regard to the reasoning of O'Hagan, J., in the *Derry Case* (1), be disregarded in interpreting what "public purposes" may mean. Mr. Fitzgerald relied on some special matters such as lighting; they do not help, as they are all ancillary to the performance of the trust—the efficient management of the harbour and its trade.

4. The last point is that the dues are of large amount; there is no provision for reducing them; and the application of any surplus is for the benefit of the Commissioners' property as they see fit. But the revenues and harbour estate are specifically appropriated to the trust, and all possibility of individual gain is excluded. It is the duty and interest of the Commissioners to adjust the dues so as not to discourage trade or raise an unnecessary revenue. The improvement of the port, to which any surplus is appropriated, is a purpose which in view of the growth of modern requirements and the pressure of mercantile competition must necessarily be entrusted to the good sense of the Harbour Authority as occasion arises, and a specific injunction to reduce tolls would be of no practical utility. The confidence reposed by Parliament in the Governing Board cannot be relied upon transforming a public duty into an ordinary trust.

Both these latter points (3 and 4) are covered by the *Salter's Load Sluice Case* (2) and the *Liverpool Case* (3) as explained in *Badcock's Case* (4). As so explained, they were approved of by O'Hagan, J., and Barry, J., as authorities upon the construction of "public purposes." In the *Salter's Load Sluice Case* (2), as already pointed out, there was no provision in the Special Act for reducing tolls, and the direction in the *Liverpool Case* (3) to that effect was relied upon by Lord Tenterden not in reference to public purposes, but on the question of specific appropriation of the tolls so as to exclude rateability.

(1) I. R. 2 C. L. 577.
(2) 4 T. R. 470.
(3) 7 B. & C. 61.
(4) 6 Q. B. 787.

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Had Parliament used precise and unambiguous language, the duty of the Court in construing it would not have been affected by the fact that the decisions on which the statutes were presumably based were afterwards shown to be erroneous: *Reg.* v. *Oldham* (1). Unfortunately the Legislature only reproduces the vague phraseology which was the subject of constant conflict and fluctuation of judicial opinion. Where are we to strike the current of authority? Is it to be above or below the place where the influence of Lord Campbell makes itself strongly felt? My inclination is with Lord Campbell in his aversion to increasing the area of exemption at the expense of the general body of ratepayers. The phraseology of the Valuation Act, conferring immunity in respect only of hereditaments *altogether* of a public nature so long as they may be occupied for *the* public service, seems more appropriate to premises used for national purposes of State than to property of a harbour authority owning an extensive estate with powers to purchase borrow and raise a large revenue from persons using the harbour who can sue for negligence. While, however, the *Derry Case* (2) stands unreversed, a Court of first instance must apply its principle and reasoning. The case cannot be restricted to public highways and parks open to the public without charge. The immunity, so long recognised and enjoyed in reliance upon its authority, can now only be interfered with by legislation. It is a matter of regret that, upon a question affecting such large interests, and of such difficulty, the decision of this Court should be final and without appeal.

O'BRIEN, J.:—

This is a case stated by the Recorder of Belfast under the Valuation Acts for the opinion of this Court as to the liability of the Belfast Harbour Board to rates; and when it is mentioned that the proposed assessment amounts to no less than £2000 a-year, representing probably the interest on eighty or a hundred thousand pounds of stock issued by that body, and that the question affects so many as seventeen other bodies of the same kind which have hitherto enjoyed immunity from taxation, the magnitude of a

(1) L. R. 3 Q. B. 474. (2) I. R. 2 C. L. 577.

question, involving so large a redistribution of public burthens through the means merely of judicial decision, will be understood. Whether it is expedient for the community that public undertakings should be exempt at all from taxation—whether the burthen ought to be thrown on one class or another in view of the benefits received—or that the State should give and restore from public funds, or except in the first instance from contributions to them—or whether there is any danger that public bodies may gradually eat up by exemption the area of taxation—that the tide may rise until those who have to provide for the common wants of the community by taxation have hardly any ground to stand upon—these are questions lying outside the domain of law, difficult and necessary as it is to withstand their influence. We have merely to ascertain the law as it exists, and neither the importance of the result nor the length of the argument can enlarge the narrow compass within which that inquiry is circumscribed—namely, whether the *Londonderry Bridge Case* (1) governs the present. In my opinion it is the certain and clear law of this country, as laid down in that case, that the Belfast Harbour Board is not liable. I consider it no province of ours to enter into the question whether the reasoning of the Court of Queen's Bench, following the decision of the highest tribunal in the *Mersey Docks Case* (2), or that of the Court of Exchequer Chamber, on the contrary, was well founded; or whether the Court ought to have put a construction on the words "dedicated to or used for public purposes," in the Irish statute, differing from what the House of Lords had decided to be the antecedent law concerning such property not being exempt, and contrary to the strong policy of having one uniform rule of law for the whole kingdom on the same subject.

The view on which the Exchequer Chamber appear to have acted, from the judgment of Chief Justice Monahan, was that, under the Statute of Elizabeth, though not by any words of that statute, property held for public purposes was held at one time to be exempt, and, during that state of opinion, words supposed to have the same effect of exemption were used in the Irish Act, 1 & 2

(1) I. R. 2 C. L. 577. (2) 11 H. L. Cas. 443.

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Vict. c. 56, and that, afterwards, when, by the decision of the House of Lords in the *Mersey Docks Case* (1) the decisions upon the Statute of Elizabeth were divorced from their supposed effect of exemption, the union of words designating public purposes with the same meaning in the Irish Act still continued. We have not to consider whether there was any point of infirmity in this argument. As the question arising on the multitude of decisions was cured for England by the *Mersey Docks Case* (1), so it is closed for Ireland by the *Londonderry Bridge Case* (2). The question within our limited function is not whether the Court was right or wrong in deciding, but what it was intended to decide; and, beyond all doubt, the judgment of the Exchequer Chamber in Ireland was that property of the same kind and under the same conditions as exist in this case was exempt from rating. Some endeavour was made to establish a distinction between the nature of this property, and that of the trustees of the Londonderry Bridge, but I do not think that it succeeds in any important or substantial respect, on any point that affects the application of the principle. The accounts of the Harbour Commissioners, which are made part of the case, and the several Acts of Parliament—for Acts of Parliament, attended with great cost, and imposing a great burthen on the community, for which a promised remedy is not yet provided, are a regular equipment of public bodies, in fact, a necessary element of respectability, and Belfast has been copiously served in that regard, having not less than seven of them—furnish complete information as to the trusts and the revenues of the body, and their employment. And I do not see that either the creation of a sinking fund for the redemption of debts or stock, or the accretion of balances or funds temporarily held for occasions that cannot be foreseen, or expenditure that varies from time to time, or the receipt of tolls, which existed in the *Londonderry Case* (2) also, or the use of revenue to make the bridge free in the one case, and to reduce the tolls in the other, or the temporary occupation of land for the purpose of the undertaking—all being subordinate to the object of improving and maintaining the harbour of Belfast, and the funds being incapable legally of being applied to any other

(1) 11 H. L. Cas. 443. (2) I. R. 2 C. L. 577.

purpose—make any substantial difference whatever. These are the common incidents of the undertaking, and so long as they are circumscribed within the object declared by the Act of Parliament itself, they cannot detract from the description of purposes altogether or exclusively public.

But, besides the condition of paying tolls, which in the *Derry Case* (1) would cease, but in the present case would be permanent, it was contended that one object was for the public in general, while the other was merely for access to a locality. But the sea is as much the king's highway as a road or bridge; and it is not less the king's highway, because it is a highway of nations, the road of commerce and means of diffusion of wealth, which in Belfast is turned to such good account for the great prosperity of the community, of which all classes share the advantage; and such things as havens for human safety exclude, in the mind of the civilized world, all idea of mere local interest.

This question has now been settled for a very long time. The former Recorder of Belfast decided many years since that the Harbour Commissioners were not liable to rate. The same decision was pronounced by Sir Frederick Shaw, in the case of the Dublin Port and Docks Board. Parliament, by successive Acts, has authorised money to be borrowed and stock to be issued, to a vast amount, upon the security of revenue resting in a very substantial proportion upon that immunity from taxation. Can it be that it is within the competence of a legal tribunal, by means of decision, without legislation, merely because the annual nature of the rate gives a technical right to revive the question, to alter a state of law that has existed now for sixty years, from the 1st and 2nd of Victoria, on which the Valuation Office itself has acted during all that time—to destroy the security on which all that money has been borrowed—to violate the principle of continuity, which is the fundamental idea of all law—to give effect to that instinct of uneasiness, spreading to new spheres of activity, that makes it a sufficient reason with a large class, because a thing has existed, that it should cease to exist, until, in the current of restless change, it is impossible for persons to know where they stand.

(1) I. R. 2 C. L. 577.

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This occurs to me to be the proper subject of legislation and not of judicial decision. I am of opinion that the question, in the form in which it was put to us—whether the hereditaments set out in the notice of appeal are hereditaments of a public nature and occupied for the public service within the statute—ought to be answered in the affirmative; that, therefore the learned Recorder was right in his decision, and that the appeal of the Commissioner of Valuation to this Court ought to be dismissed.

The Court declined to allow costs.

Solicitor for the Harbour Commissioners: *E. Bates.*
Solicitor for the Commissioner of Valuation: *Sir P. Coll.*

A. E. R. J.

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April 29, 30. June 28.

FITZPATRICK *v.* M'GLONE (1).

(1896. No. 2063.)

Revocation of probate—Charitable bequest—Legatee in trust—Non-liability for money applied in good faith, in accordance with the provisions of alleged will.

Probate of an alleged will having been granted in common form to the executors named therein, they paid a charitable bequest to the defendant, who *bona fide* and without any notice of the invalidity of the alleged will, applied portion thereof in accordance with the trusts of the bequest.

Probate was afterwards revoked (not by consent), and letters of administration of the personal estate of the deceased, as dying intestate, were granted to the plaintiff:—

Held, that the plaintiff could not recover from the defendant the amount which the latter expended in execution of the supposed trusts.

MOTION by the plaintiff, notwithstanding the verdict found for the defendant at the trial to enter judgment for the plaintiff for £81 19*s.* 10*d.* in addition to the sum of £118 0*s.* 2*d.* brought into Court.

(1) Before PALLES, C.B., and ANDREWS, J.

Ronan, Q. C., Henry, Q. C., and *P. C. Gaussen*, for the plaintiff. *Ex. Div.* 1897. FITZPATRICK v. M'GLONE.

The Right Hon. The MacDermot, Q.C., Matthew J. Bourke, Q.C., and *Brayden*, for the defendant.

The facts of the case and the arguments of counsel are fully stated in the judgment of the Lord Chief Baron.

PALLES, C.B. :—

June 28.

This case, which was very ably argued, raises a question of some nicety and interest. A document, which purported to be the will of one John Madden, deceased, was, on the 7th July, 1890, proved in common form in the Probate and Matrimonial Division of the High Court by the Rev. Patrick Flanagan and Arthur M'Mahon, the executors named therein; and "administration of all and singular the personal estate and effects of the said deceased" was granted by the Court to them, "the executors named in the said will."

This document was afterwards impeached as not being in fact the will of Madden, and by a decree of the Probate and Matrimonial Division, dated the 20th November, 1895, in a suit of *M'Glone* v. *Flanagan*, after reciting that no evidence had been given by the defendant in support of the alleged will, it was condemned, the probate was revoked, and subsequently administration of the effects of Madden, as of a person who died intestate, was granted to the plaintiff. The alleged will contained bequests to the defendant of £100 for the relief of the poor of Rosslea, and of £100 for the repairs of Rosslea Roman Catholic Church. These sums were paid to the defendant, and out of them £81 19*s.* 10*d.* was expended by him, in accordance with the provisions of the alleged will, in good faith, and without notice of any question as to the validity of that document.

This action was brought by the administrator to recover the £200 from the legatee. He lodged in Court £118 0*s.* 2*d.*, being the unexpended balance in his hands, and the question is, Is he liable to the plaintiff for the remainder of the money?

The exact question thus raised does not appear to have been

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the subject of decision in any reported case. A similar question was argued in the Queen's Bench Division in *Duane* v. *Lee* (1), but there the will was condemned *by consent*, and the Court were of opinion that certain words in the consent prevented the administrator from raising the question. The question is, however, glanced at in his judgment by May, C.J. He says:—"Now, if in this case the will of the deceased, and the probate granted thereon, had been set aside in an adverse proceeding, and, independently of the compromise or consent, the question would have arisen whether the present plaintiff could, under circumstances like the present, have recovered the sum paid by the executor to the defendant, as money paid to her use. At the time when this money was paid by Mr. Cleary to the defendant, the former had obtained the judgment of the proper tribunal, establishing the will and his title as executor. The money was *bona fide* paid to the legatee, and *bona fide* expended by him according to the trusts and directions of the ostensible will. After the money had been so expended, could a subsequent administrator, the will and probate having been set aside, recover, in an action such as the present, from the legatee the money so *bona fide* paid to and expended by him? If the executor had sold to the defendant goods of the deceased capable of being followed, it may be that the subsequent administrator could recover such goods in trover from the defendant, who would be unable to establish his legal title to them, as in the case of *Graysbrook* v. *Fox* (2); or the administrator, waiving the tort, might sue for the proceeds of the goods. But I cannot find a case like the present, in which a legatee has *bona fide* received money from an ostensible executor, duly constituted by the proper tribunal, and has duly applied the apparent bequest in carrying out the trusts of the presumed will, and afterwards, the will and probate being set aside, has been held liable to repay to an administrator the money thus received. . . . In the present case I do not think it necessary to consider or decide such a question."

Being thus obliged to determine the matter upon principle, I am of opinion that the action is not maintainable. The whole

(1) 14 L. R. Ir. 56. (2) Plowd. 276.

argument for the plaintiff was rested upon the proposition that the grant of administration to the Rev. Patrick Flanagan and Mr. M'Mahon was void *ab initio*, as distinguished from being voidable. It was insisted that they never had any property in the goods of the deceased, and that the case was that of a stranger selling Madden's property, and handing to the defendant part of the proceeds with notice of the source from which it came. It was insisted that an executor derives his entire authority, not from the probate, but from the will, and that as there was no will there could never have been any title. In support of the contention that the grant was void and not merely voidable, the cases of *Graysbrook* v. *Fox* (1), *Abram* v. *Cunningham* (2), and *Woolley* v. *Clark* (3), were cited as incontrovertibly establishing the proposition.

In each of these cases the revoked sentence or grant was one of administration as in a case of intestacy; in each case there had been a valid will appointing an executor, and in each the previous grant of administration was held to be void *ab initio*. In cases of this class, where the deceased has left a will appointing an executor, the personal estate of the deceased vests in the executor at the moment of death, therefore it does not pass to the Judge of the Court of Probate, and consequently there is nothing in him which can pass by his grant, and he is without jurisdiction to appoint an administrator; so that, although it is not competent to show this want of jurisdiction until the grant is revoked, when it is revoked and the truth is thus permitted to appear, it follows from the mere fact of the existence of the will appointing an executor that nothing passed by the grant. This was the true *ratio decidendi* in these cases. In the judgment of the majority of the Court in *Graysbrook* v. *Fox* (1) it is said:—"Then if the law immediately after the death of the testator vests the property and the possession of his goods in the executor, from thence it follows that the law never vests the property in the ordinary, and from thence it follows that the law never vests the property in the administrator. For if he should have the property, then there would be two properties of one thing, or at least the law must

(1) Plowd. 276. (2) Lev., part 2, 182. (3) 5 B. & Ald. 744.

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take the property out of the executor and vest it in the administrator; but the law will not do him such wrong, nor will it divest that which it has once vested. And the administrator cannot have a greater property of the things in possession than the ordinary had before, and here the ordinary before administration had no property at all, nor anything to do with the goods, but the executor had the property and the full possession of them."

The grounds of the judgment in *Abram* v. *Cunningham* (1) are not given. No more is said than that "The Court were strongly of opinion for the defendant, that the administration was void at first, and was not made good by the renunciation of the executor"; but the argument of the counsel for the defendant was substantially the same as that which I have quoted from the judgment in Plowden. "Levinz answered, that the grant of administration, there being an executor *in esse*, was utterly void, and not voidable, and so could not be made good by the renunciation; and this for two causes: (1) Where there is a will and executor *in esse*, the ordinary hath no power to commit administration but as he is enabled by the statutes of the realm: 9 Coke; *Hensloe's Case*. Now the statute of 31 Edw. 3, c. 11, is, that where a man dies intestate the ordinary shall commit administration to his next friends. The ordinary, then, hath no power by this statute till the party dies intestate, which was not in this case till the executor had refused. And the statute of 21 Hen. 8, 5, is more plain; for that is *in case any person die intestate, or the executors refuse, then the ordinary shall commit administration*. When, then, shall he commit? When the executor refuses. By the death of the testator the executor hath immediately the property of the goods in him, and may either grant or release before *probate*, though he cannot maintain an action: 5 Coke; *Middleton's Case*. How, then, can the ordinary vest the property in another by granting him administration? For there cannot be two several properties in several persons in the same thing. Suppose the executor sell to one, and the administrator to another, and afterwards the executor refuse, which of the two vendees should have the goods sold? Doubtless the vendee of the executor."

(1) Lev., part 2, 182.

This principle cannot have any application to a case such as the present, in which the deceased died intestate, because in such a case the personal estate vests in the Judge, and he has jurisdiction to grant administration of it, and the probate contains the words already quoted, which amount to a grant of administration. I cannot entertain any doubt that the effect of that grant was to pass the property in the goods, which theretofore was vested in the Judge, to the Rev. Patrick Flanagan and Arthur M'Mahon, to whom he committed the administration; and that for that reason the case is distinguishable from those already mentioned, and that the grant is voidable merely, and not void. I called attention to this distinction during the argument; but the only answer I received, indeed the only answer that it was capable of receiving, was that the administration was committed to the named gentlemen as executors, and that, as they were not executors, nothing passed; in other words, that no authority passed by the probate to the ostensible executors. No doubt the reason which induced the Court to make the grant was that it wrongly determined the writing to be the will of the deceased; but still the grant was one within the jurisdiction of the Court, and being within jurisdiction, in my opinion it passed the property. I should have so held on principle, and irrespective of authority; but there are two cases which, although not identical in their circumstances, appear to me to be decisive authorities upon the principle. I refer to *Allen* v. *Dundas* (1) and *Boxall* v. *Boxall* (2). In *Allen* v. *Dundas* (1) the question was whether a payment made by the defendant, a debtor, to a person who had, in fact, died intestate, to an executor who had obtained probate of a forged will, was a discharge to the debtor. There, as here, there was in fact an intestacy; and the spiritual Court had jurisdiction over the subject-matter. It was argued for the administrator that, if the probate had not existed, the payment would have been one by mistake, and the debtor might recover it back again from the person to whom he made it; and that the probate could not make any difference as to the plaintiff, the rightful administrator, because the will, under which alone the executor derived his

(1) 3 T. R. 125. (2) 27 Ch. D. 220.

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power, was forged; and the anonymous case from Comyns (p. 152), mentioned by Mr. Ronan, was cited, in which Trevor, C. J., held that the probate gave no authority to the executor, but was only evidence of his right. It was also insisted that an executor, acting under a probate, was not like an administrator acting under the ordinary, for the ordinary makes an administrator, but not an executor. For the defendant, a passage was cited from Brooks' Abridg. (Admor. pl. 33), that "Where the ordinary revokes letters of administration, and then grants other letters of administration to another, the mesne acts done by the first administrator shall be valid"; and it was argued that there can be no material difference, whether the party to whom the first and erroneous grant is made claim as executor or administrator. It was further pointed out that a distinction was taken by Trevor, C.J., in the case in Comyns, between the administration being repealed upon a citation upon the one hand, or upon an appeal upon the other. "If upon appeal, which suspends the administration, all acts *after such suspension* are void; if, upon citation, all the acts of the administrator, till the repeal, are good." The Court there held unanimously that the payment was a good discharge; and I quote the following sentences from the judgments, to show that a material part of the *ratio decidendi* was that the spiritual Court had jurisdiction. Ashurst, J., says:— "Here the spiritual Court had jurisdiction over the subject-matter, and every person was bound to give credit to the probate until it was vacated. The case of a probate of a supposed will during the life of the party may be distinguished from the present, because during his life the ecclesiastical Court has no jurisdiction, nor can they inquire who is his representative, but when the party is dead it is within their jurisdiction. Besides, the distinction taken by the defendant's counsel, between cases where a will is set aside on an appeal, or on a citation, seems to have some foundation: in the former, the original sentence is as if it had never existed; in the latter the will is only repealed, and all acts under it till the repeal are good." Buller, J., said:— "Then this case was compared to a probate of a supposed will of a living person; but in such a case the ecclesiastical Court have no jurisdiction, and the probate can have no effect; their juris-

diction is only to grant probates of the wills of dead persons. The distinction in this respect is this: if they have jurisdiction their sentence, as long as it stands unrepealed, shall avail in all other places; but where they have no jurisdiction, their whole proceedings are a nullity." He adds that the case in Comyns carries its own death wound on its face. He then proceeds to discuss elaborately the reason of that decision, and, *inter alia*, says: "Then he" (Trevor, C. J.) "proceeds to point out the difference between a citation and an appeal. Now, if that distinction extends to the case of executors as well as administrators, it will decide the present case; but he goes on to add in that case:—'But it is otherwise in the case of an executor, for the probate of the will gives no authority at all to him.' In that I differ from him, because an executor has an authority which a Court of common law cannot dispute." Grose, J., says:—"The case in Comyns seems to be grounded on a false principle, namely, that the probate of a will gives no authority to the executor. But I think it does; and so much so, that it cannot be traversed or denied."

In *Boxall* v. *Boxall* (1) the grant of administration was as in case of an intestacy, although there was in fact a will, but one which did not appoint an executor; consequently the property had vested in the Judge, and therefore he had jurisdiction to make an administrator. In that case, as in this, the Judge was deceived. In each case the reason for making the grant was an erroneous adjudication that a state of facts existed which really did not exist. In *Boxall* v. *Boxall* (1) he committed the administration to Mrs. Boxall, because he determined that the deceased had died intestate, whereas in fact he had made a will; but as there was jurisdiction to grant administration, it was held that the property passed by it. In the present case the administration was committed to Mr. Flanagan and Mr. M'Mahon, because the Judge determined that a document purporting to appoint them executors was a valid will; but, as in this case also there was jurisdiction to grant the administration, the same result should ensue, viz. the property would pass. It was not, and could not have been, argued for the plaintiff that assuming that the property passed by the ad-

(1) 27 Ch. D. 220.

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ministration, the action could be maintained. There is no doubt that a *bona fide* sale of part of the assets by the ostensible executors to a purchaser for value, without notice that there was no will in fact, would have been valid. The same principle must, in my opinion, apply to the extent to which the defendant acted upon the directions of the will. He was not a beneficiary; he lawfully received from the ostensible executors, without notice of any defect in their title, property legally vested in them for the purpose of applying it in a particular way; and to the extent to which he so applied it he is, in my opinion, discharged.

I have already referred to some passages in the judgments in *Allen* v. *Dundas* (1); and I have now to add that there are other passages in them which would sustain a judgment for the defendant here irrespective of the question whether the grant of administration to the Rev. Mr. Flanagan and Mr. M'Mahon was void or voidable, or, in other words, which would protect a debtor who paid an administrator in a case in which a will was suppressed and the administration was void.

The judgment of Ashurst, J., is that if the payment had been made under the coercion of a suit in a Court of law, the defendant would have been protected; that it not being so made caused no difference; that as the person to whom the payment was made had such authority as could not be questioned at the time, and such as a Court of law would have been bound to enforce, the defendant was not obliged to wait for a suit; and at the end he adds:—"The foundation of my opinion is that every person is bound by the judicial acts of a Court having competent authority, and during the existence of such judicial act the law will protect every person obeying it." The judgment of Buller, J., is based on the fact that the probate was conclusive until it was repealed; and Grose, J., said, "The ground of my opinion is that the law, which is founded on wise and sound principles, will never compel any person to pay a sum of money a second time, which he has once paid under the sanction of a Court having competent jurisdiction." Upon similar principles, the defendant here, so long as the probate remained unrevoked, he having no notice that the will was

(1) 3 T. R. 125.

invalid, was entitled to treat it as good, and to receive the money thereunder; and when he received it there was imposed upon him an obligation, enforcible in a Court of Equity, to apply it to the specified purpose, and his application of it to that specified purpose must amount to a discharge to him. I do not refer to the Probate Act, sections 82 and 83, as it is admitted that they do not include this case.

For another reason also, I am in favour of the defendant. The lowest position in which he can be placed is that of the agent of the Rev. Mr. Flanagan and Mr. M'Mahon to apply this money to the specified purpose; and as he, before notice of the defect in Flanagan's and M'Mahon's title, applied it to that purpose, the ordinary law of principal and agent protects him. Upon this part of the case, *Pond* v. *Underwood* (1) is in point. That was an action for money had and received, brought by the executor of one Charles Pond against the defendant, who was the attorney or agent of the administrator of the deceased—the letters of administration having been granted before the will was proved—to recover money which had been due to the deceased in his lifetime, and which was received by the defendant from the debtor, under a warrant of attorney executed to the defendant by the administrator. Before notice of the will, he had paid over the amount to his principal; and Holt, C.J., held that for that reason the action would not lie. This case was approved of and followed in *Sadler* v. *Evans* (2), and is part of the settled law of principal and agent.

In my opinion, the verdict should stand, and the plaintiff's application should be refused with costs.

ANDREWS, J., concurred.

Solicitor for the plaintiff: *A. J. Dudgeon.*
Solicitor for the defendant: *D. C. Rushe.*

J. P. B.

(1) 2 Raym. 1210. (2) 4 Burr. 1985.

Q. B. Div. 1897.

May 4.

ENNIS TOWN COMMISSIONERS *v.* MACBETH (1).

Rating—Borough rates—Market tolls—"Occupy"—The Towns Improvement (Ireland) Act, 1854 (17 & 18 *Vict. c.* 103), *sect.* 60—*The Towns Improvement Clauses Act*, 1847 (10 & 11 *Vict. c.* 34), *sect.* 167.

The tolls and customs of fairs and markets within the limits of a borough governed by Commissioners constituted under the Towns Improvement (Ireland) Act, 1854, are not chargeable with borough rates under section 60 of that Act. *Redington* v. *Millar* (24 L. R. Ir. 65) followed.

Case Stated for the opinion of the Queen's Bench Division, pursuant to 27 & 28 Vict. c. 99, s. 35, by the Lord Chief Baron, on the hearing before him, at the Spring Assizes, 1897, for the County of Clare, of an appeal from His Honor the County Court Judge.

The civil bill was brought to recover £16 10*s.*, for Ennis borough rates, struck the 1st June, 1896, and charged by the plaintiffs, the Town Commissioners of Ennis, on the tolls and customs of the fairs and markets of Ennis, of which the defendant was in receipt. The Town Commissioners of Ennis are constituted under order of the Local Government Board, promulgated in the *Dublin Gazette* of the 7th December, 1886, pursuant to the Towns Improvement (Ireland) Act, 1854, as amended by the 35 & 36 Vict. c. 69; and it was admitted that the rates struck by the Commissioners were legally made and imposed on all premises properly rateable to the same. The tolls and customs, in respect of which these rates were claimed, were vested in the Earl of Leconfield, under two Letters Patent, dated 1610 and 1835, to his predecessors in title. The defendant, Miss Elizabeth Macbeth, was in receipt of these tolls and customs under a parol agreement from Lord Leconfield, at the yearly rent of £143 6*s.* 10*d.*, this letting including also certain market buildings within the borough. She was also tenant, under a separate parol agreement from Lord

(1) Before O'Brien, Holmes, and Madden, JJ.

Leconfield, at the yearly rent of £36 13*s.* 2*d.* of the "Fair Green," also situate within the limits of the borough. Certain of the fairs were held in the market-place and the streets of the town, and others in the "Fair Green," which was purchased and enclosed by Lord Leconfield for that purpose about thirty years ago. On the Valuation Lists of the Commissioner of Valuation the defendant appeared as rateable to the relief of the poor in respect of the market buildings and of the "Fair Green," and also in respect of these tolls and customs, and paid poor rates in respect of all the foregoing, the tolls and customs being rated at the annual value of £90. The defendant paid borough rates in respect of the market buildings and the "Fair Green." The County Court Judge granted a decree for the amount claimed, and on the hearing of the appeal the Lord Chief Baron, at the request of the plaintiffs, and as the matter was stated to be of general importance, consented, without however expressing any opinion on the subject, to state this case for the opinion of the Court on the question—Whether the defendant, as being so in receipt of the said tolls and customs, is liable to be rated in respect thereof for the said Ennis borough rates?

H. Crowe (*Matthew J. Bourke*, *Q. C.*, with him), for the plaintiffs.

Albert Joynt and *S. Ronan*, *Q.C.*, for the defendant:—

The judgments of the Court of Appeal (affirming the dissentient judgment of Mr. Justice O'Brien in the Court below), in *Redington* v. *Millar* (1) on the similar provisions of the Towns Improvement Clauses Act, 1847, are, it is submitted, conclusive in favour of the defendant. Under the Irish Act of 1854, as under the Act of 1847, only such property as is capable of physical corporeal occupation is rateable to borough rates. But, even apart from that authority, both the course of antecedent legislation, and the terms of the Act of 1854 itself, on the 60th section of which the plaintiffs rely as authorizing the taxation of these tolls, demonstrate the immunity from borough rates of such

(1) 24 L. R. Ir. 65.

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incorporeal rights. Borough rates, in Ireland, were first imposed on "occupiers of houses rated for ministers' money" (5 Geo. 3. c. 15 (Ir.)). There was a special valuation of such houses for the purpose: 13 & 14 Geo. 3, c. 19 (Ir.); see, too, 25 Geo. 3, c. 54 (Ir.). These ante-Union Statutes were repealed by the 9 Geo. 4, c. 82 (1828), which provided for the valuation, for the purposes of local taxation, of "all houses, shops, warehouses, cellars, mills, yards, gardens, and tenements, situate within" the city or town. This Act clearly defined the subjects of taxation as all of a corporeal nature: see the judgments of Lord Ashbourne, C., and of O'Brien, J., in *Redington* v. *Millar* (1). The Irish Poor Law Act, 1 & 2 Vict. c. 56, was passed in 1838, and was followed by the General Valuation Acts of 1852 and 1854; and these Acts contain a list of "rateable hereditaments," which categorically includes incorporeal rights, such as fisheries and tolls. But, though that enumeration was before them, the Legislature, when subsequently dealing with borough rating, still adhered to the more circumscribed limits of taxation laid down in the Act of 1828, though substituting the general valuation lists for the purpose of assessment. For, although the Municipal Corporations (Ireland) Act, 1840, 3 & 4 Vict. c. 108, apparently made rateable to borough rates all hereditaments charged to the relief of the poor—see sections 74, 124, 133—the amending Act, passed three years later—6 & 7 Vict. c. 93 (see sects. 16, 17, 18)—re-enacted the provisions of the 9 Geo. 4, and again made borough rates payable by "the owners, occupiers, and tenants of the houses, shops, warehouses, cellars, mills, yards, gardens, and tenements liable to be rated and assessed under the provisions of the said Act," *i. e.* 9 Geo. 4, c. 82, substituting merely the general or poor-law valuation for the old local valuations under the 9 Geo. 4. The 18th section conclusively shows that it was contemplated that the areas of liability should be different. In this state of things the Towns Improvement Clauses Act of 1847, 10 & 11 Vict. c. 34, was passed, which made borough rates leviable "upon any person who occupies any of the prescribed kinds of property"—"prescribed" meaning (sect. 3) prescribed

(1) 24 L. R. Ir. at p. 66; 22 L. R. Ir. at p. 84.

by the special or local Act—"or (if no property be prescribed) any house, shop, warehouse, counting-house, coach-house, stable, cellar, vault, building, shop, manufactory, garden, land, or tenement whatsoever (except as hereinafter is excepted)." Section 167 gives the exemptions—charitable purposes, &c.—and provides that no person shall be rated in respect of *tithes*. (Counsel also referred to sections 176, 179, 180, and to the definition section.) Under this Act it was decided by the Court of Appeal—in reference to the Special Act for the borough of Galway (16 & 17 Vict. cap. cc.)—that a several fishery was not rateable—reversing the decision of the majority of the Queen's Bench Division, which had been wholly grounded on the express exemption of tithes in sect. 167. In the year 1854 The Towns Improvement (Ireland) Act, under which the claim in the present case is put forward, was passed. In section 1 this statute defines that "the word 'lands' and the word 'premises' shall include all lands, springs, dwellinghouses, shops, warehouses, vaults, cellars, stables, breweries, manufactories, mills, and other houses and buildings and yards and places." Then section 60 provides that once in each year the Commissioners "shall assess all occupiers of premises within the town and the boundaries thereof . . . rated in respect of such premises under the Acts for the relief of the destitute poor, in the sums necessary to be levied for the purposes of this Act," with a provision that all unoccupied premises, being at the time of such assessment unproductive to the lessors or landlords thereof, should be exempt. The words "occupier" and "occupy" in this as in the earlier statutes, are used in their ordinary sense, and cannot be strained to apply to the perception of the profits of incorporeal rights: see *Druitt* v. *Overseers of Christchurch* (1). Further, where in sect. 60 the word "premises" occurs, its equivalent, taken from the definition section, must be read in its place. The definition plainly is taken from the earlier Acts above referred to, and as plainly treats only of things that are in their nature capable of physical occupation. The case therefore is a stronger one than *Redington* v. *Millar* (2), for the only two foundations of an argument in that case are absent here—the addition in the Act of 1847 of the words

(1) 12 Q. B. D. 365. (2) 24 L. R. Ir. 65.

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"tenement whatsoever," and the specific exemption of such an incorporeal right as tithes.

The words, in sect. 60, "rated in respect of such premises under the Acts for the relief of the poor," merely point out the mode of assessing the annual value of rateable "premises," and provide for the adoption of the general Valuation Lists, but they do not imply, and it does not follow, that the "rateable hereditaments" in the Poor Law Acts, and the "premises" in the Act of 1854, are the same. A like provision is to be found in the Galway Special Act, sect. 78, that "the annual value of all property rateable under this Act shall be ascertained according to the next preceding valuation of rateable property made and in force for assessments for the relief of the poor within the limits of this Act." [O'BRIEN, J., referred to *Keogh* v. *Poicer* (1).]

Matthew J. Bourke, Q.C., in reply:—

Redington v. *Millar* (2) was a decision on the Act of 1847 and the Galway Special Act of 1853; the Act of 1854 must be construed upon its own terms. The word "premises" in section 60 is in its ordinary and natural sense sufficient to embrace as well incorporeal as corporeal rights, and cannot be cut down by the definition of that term in section 1. The definition is there introduced by the words "shall include," which shows that it was not intended as an exhaustive or complete description, but as extending the application of the word to matters which in its ordinary sense it might not be held otherwise to embrace. The true construction of section 60 and the intention of the Legislature was that all premises (using the most general and widest term) rated to the relief of the poor should be the subject of this borough taxation; and, whatever reasons may be adduced for exempting a fishery under the Act of 1847, there are none for giving immunity to rights the exercise of which must necessarily cast upon the local rates a very serious expense. In many towns throughout the country borough-rates are assessed on market tolls and customs, and are paid without question.

(1) 2 Ir. Jur. (O. S.) 100. (2) 24 L. R. Ir. 65.

O'BRIEN, J.:—

The members of the Court do not consider it necessary to reserve this case for further consideration. To a certain extent it appears to me that *Redington* v. *Millar* (1) is an authority upon the question of the liability of these tolls to the local rates; but whether this be so or not, I have formed a clear opinion that the terms of the provisions of the Towns Improvement (Ireland) Act of 1854 preclude the plaintiffs from making out their contention with that degree of certainty which the law requires before taxation can be imposed upon a subject. From a very early period, in several cases, such as the *Commissioners of the Belfast Police* v. *Tomb* (2) in the time of Mr. Justice Burton, and at a later date in the decision of Chief Justice Lefroy in *The Queen* v. *The Guardians of The Mallow Union* (3), the principle has been again and again laid down that a statute imposing a tax upon a subject must create that liability in clear and unambiguous terms. If that be the rule of construction, it appears to me that Mr. Bourke's clients have been unable to discharge the burden that lay on them. Even on their own view the matter is one of extreme difficulty; and, having regard to the terms of the Act itself, to the nature of the property which it renders liable to assessment, and to the whole course of the legislation dealing with these local rates commencing with the statutes of the Irish Parliament, afterwards embodied in the 9 Geo. 4, c. 82, I think it is manifest that it was not the intention of the Legislature to impose a tax on property of this description for the purposes of borough rating. It is certainly inconceivable that, by a mere reference, the words of section 60 of the Act of 1854, "occupiers of premises within the town rated in respect of such premises under the Acts for the relief of the destitute poor," can be made to include incorporeal rights. All "premises," in any sense of the term, are liable to poor rates; but can the word be held for the purposes of borough rates to include the whole range of subjects to which the Poor Law Acts apply? Would not some clearer expression have been employed to produce that effect? But, further, the word "premises" in section 60

(1) 22 L. R. Ir. 78; 24 L. R. Ir. 65.
(2) Smythe, 401, 454.
(3) 12 Ir. C. L. R. 35; 5 Ir. Jur. (N. S.) 164.

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must be taken and read in connexion with the definition section, which excludes any intention to bring tolls within the scope of the Act. The terms of other sections to which we have been referred also show that it was intended only to denote and include property capable of physical occupation. These tolls, in my opinion, are not liable to the borough rates, and our answer to the question submitted to us therefore must be in the negative.

HOLMES, J.:—

Redington v. *Millar* (1) is a direct authority upon this case unless it can be shown that section 60 of the Act of 1854 prescribes some subject-matter of taxation over and above what is prescribed by section 167 in the Towns Improvement Clauses Act of 1847. I confess that I am disposed to think that section 60 neither intended to prescribe, nor in fact does prescribe, a different subject-matter of taxation; and that, though the words "premises . . . rated under the Acts for the relief of the poor" are there introduced, still the section, on its true construction, deals with the same classes of property as are made liable under the Act of 1847. If I am right in this, we must decide in favour of the defendant, for then we are bound by *Redington* v. *Millar* (1) which is a precise authority on the point. Even if I am wrong, it remains to find out what is the meaning of the term "premises" in the section; and, to my mind, there is no answer to Mr. Ronan's argument that, if recourse is had to this means of solving the question, we must go to section 1 of the Act, where a definition is given of "premises" which, it seems to me, does not include such property as tolls.

MADDEN, J.:—

I have already expressed my view of the case during the argument when I said that Mr. Bourke could escape from the Scylla of *Redington* v. *Millar* (1) only by falling into the Charybdis of the first section of the Act of 1854, for I agree with Mr. Ronan that section 60 must be construed as if the definition contained in

(1) 24 L. R. Ir. 65.

the 1st sect. were read into it, and substituted for the word "premises." Thus interpreted, the section itself affords a sufficient answer to the plaintiffs' case. The result is in accordance with the rest of the statute, so far as it has been brought before our notice in the argument, and also with the history of taxation for local purposes in this country (as was pointed out by Mr. Joynt in his excellent argument) from the year 1765 to the present time.

Solicitor for the plaintiffs: *W. Healy.*
Solicitor for the defendant: *F. Kerin.*

J. H. P.

REG. (GILBEY) *v.* JUSTICES OF CO. FERMANAGH (1).

Licensing law—Spirit-grocer's license—Certificate of Justices—"Person dealing in or selling tea, cocoa-nuts, chocolate, or pepper"—Residence—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *ss.* 81, 82—*Licensing Act*, 1874 (37 & 38 *Vict. c.* 69), *ss.* 9, 10—*Mandamus.*

G., a member of a firm of wine merchants in London, and himself living in London, applied to the Justices of county Fermanagh for the necessary certificate for a spirit-grocer's license (under 35 & 36 Vict. c. 94, s. 82, and 37 & 38 Vict. c. 69, ss. 9, 10) in respect of premises in Enniskillen which had been acquired by his firm. The application having been refused on the ground that G. was not a "grocer" as defined in sect. 81 of 35 & 36 Vict. c. 94 (*i.e.* a person dealing in tea, cocoa-nuts, chocolate, or pepper), G. applied for and obtained a conditional order for writs of *certiorari* to remove the order of refusal and of mandamus to compel the Justices to rehear the matter. On motion to make absolute the conditional order:—

Held (*per* Sir P. O'Brien, L.C.J., and Gibson, J., *diss.* O'Brien, J.), that the Justices were wrong in holding that because the applicant was not at the date of the application to the Justices dealing in any of these commodities, he was therefore not entitled to the certificate, it being for the Excise to ascertain the existence of this qualification when issuing the license;

But *held* further (*per* Sir P. O'Brien, L.C.J., and Gibson, J., *diss.* O'Brien, J.), that G. was not resident within the Petty Sessions District; that the Justices therefore would not have jurisdiction to grant the certificate applied for, and that accordingly it would be futile to direct the writs to issue.

(1) Before SIR PETER O'BRIEN, L.C.J., and O'BRIEN and GIBSON, JJ.

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MANDAMUS. The prosecutor, Sir W. Gilbey, caused the requisite notices to be served of his intention to apply (in his own name), at the annual licensing Petty Sessions, Enniskillen, to be held on the 28th of September, 1896, for the statutory certificate for a spirit-grocer's license in respect of certain premises in the town of Enniskillen. The notices described Sir W. Gilbey as of a London address, and as one of the firm of W. & A. Gilbey, Limited, of London. The application came on for hearing before the resident magistrate and seven other Justices. The District Inspector of Police admitted the suitability of the premises and the applicant's good character, and offered no opposition. The applicant's local manager proved that Messrs. Gilbey had that year taken a lease of the premises in question and had expended a considerable sum in adapting them for the purposes of the proposed business. Mr. C. Falls, the applicant's solicitor (in the affidavit on which the conditional order was obtained), stated that the manager was asked by one of the Justices whether Messrs. Gilbey were dealers in tea, chocolate, cocoa-nuts, or pepper, and replied that they were not, whereupon the Bench, by a majority, decided that it was a condition precedent to their jurisdiction to grant the certificate that the applicant should be at the time a dealer in these articles, and that they refused the application on this ground, their order, as entered, being, "Certificate refused; no jurisdiction, the applicant not coming within the definition of 'spirit-grocer' within the Act."

The Court having granted a conditional order for writs of *certiorari* and *mandamus*, three Justices out of the eight filed joint affidavits of a somewhat contentious character. From these affidavits it appeared that the deponents were of the majority, but not what that majority was, nor whether these three were authorized to speak for any members of the Bench save themselves individually. They said that the entry which they had directed the chairman to make in the Order Book was "No jurisdiction" simply; that they understood it to be enacted that it was only to a grocer or a person licensed as a grocer that a spirit-grocer's licence could be granted: and that it was only to such person—to a grocer as defined by 35 & 36 Vict. cap. 94, sect. 81, and 37 & 38 Vict. cap. 69, sect. 9—that they could give the certificate

of good character and of the suitability of the premises under the Act; that they "knew absolutely nothing of the applicant, Walter Gilbey, who had never carried on business as a grocer, nor any business in the town of Enniskillen"; and that therefore they had no jurisdiction to grant the application, it being sworn before them that the applicant had not and would not obtain a grocer's licence as defined by the Licensing Acts, and "that he did not ever intend being a grocer." It appeared that it was admitted that the applicant had no intention of coming to reside in Enniskillen.

Counsel for Sir W. Gilbey now moved to make absolute a conditional order for writs of *certiorari* and *mandamus*, on the ground as to the *certiorari*, that the order of the Petty Sessions refusing to grant the certificate was without and in excess of jurisdiction, and was founded on no due or legal objection, and was made on grounds not warranted by law.

S. Ronan, Q.C., J. H. Campbell, Q.C., and *Fetherstonhaugh*, for the applicant.

Henry, Q.C., and *Morphy* for the Justices.

Cur. adv. vult.

1897. Feb. 23.

GIBSON, J.:—

Up to the year 1869, when the Act 32 & 33 Vict. c. 14, sect. 15, was passed, any person duly licensed to trade in coffee, tea, cocoanuts, chocolate, or pepper, and from 1869 to 1872, any person dealing in such articles, was entitled, if he chose, to obtain from the Excise a spirit-grocer's licence. The duty was thrown on the Excise of ascertaining the existence of the qualification—a duty more easily discharged than that imposed by the Statute 3 & 4 Wm. 4, c. 68, in reference to the sufficiency of sureties: *M'Garry* v. *Pape* (1); but they had no other obligation, and were bound to issue the licence as a matter of right to any duly qualified applicant. The Act of 1872 introduced two changes. In the first place, section 81 created a new definition of "spirit-

(1) 9 Ir. L. R. pp. 152, 153.

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grocer," a term which now means any person dealing in or selling tea, cocoa-nuts, chocolate, or pepper (coffee being omitted), and having an Excise licence under 8 & 9 Vict. c. 64; and, secondly, section 82 in two cases prohibits the issue of an Excise licence without a certificate of Justices. The first of these cases was where the applicant had at any time during the next preceding two years been a spirit-grocer or had held a certificate under the Beerhouses Acts. Such person was obliged to obtain and produce to the Excise a certificate to his good character and to the peaceable and orderly manner in which his business was conducted during the year next preceding the expiration of his former licence or certificate. The function of the magistrates is expressly limited and defined; and there is nothing to show that they were required to ascertain whether the applicant was a dealer in tea, &c., the duty of determining the existence of that qualification being left, as before the Act, with the Excise. The section imposes a new condition to the issue of an Excise licence, and does no more.

The second case where a certificate was required was where the application was for renewal. There the certificate was to be to the good character of the applicant and to the peaceable and orderly manner in which his business (that is his business as spirit-grocer) was conducted during the past year. From the composite character of the definition of "spirit-grocer," contained in section 81, it would seem that the applicant must have been dealing in tea, &c., as well as spirits during that year, and it might therefore be the duty of the certifying magistrates, according to *Cox's Case* (1), to inquire whether he had been conducting business of the defined character, including the sale of tea, &c., for that period.

The provisions of section 82 as to grants and renewals were extended by section 9 of the Act of 1874 to the grant of new Excise licences and transfers, with the qualification that the certificate was to be to the good character of the applicant and to the suitability of the premises. The reference here to renewals is not easy to understand or apply. It can hardly alter

(1) 16 L. R. Ir. 424.

or enlarge the duty imposed on the magistrates, or make a difference between persons formerly licensed applying for grants under section 82, and persons not previously licensed applying for a new grant under section 9. If in the former case it was the Excise and not the Justices who must ascertain the dealer's qualification, the same construction must be given to section 9, which expressly limits the functions of the Petty Sessions Court. The circumstance that the certificate was extended to suitability of the premises gives no help to Mr. Henry. The suitability is for a future business, and both parts of the spirit-grocer's trade, sale of tea as well as sale of spirits, may be new.

I think, therefore, that the Court below was wrong in holding that the applicant, because he was not at the date of application dealing in tea, &c., was disentitled to the certificate.

A further point was raised by counsel before us, viz. that the Justices had no jurisdiction to certify, because Sir W. Gilbey was not then resident within their district. Section 82 incorporates the procedure under the Beerhouses Act of 1864, the fourth section of which requires any person applying for a certificate to give notice in writing, setting forth, *inter alia*, his place of residence and the situation and place of the proposed business house. The magistrates, who alone could give the certificate prescribed by section 82, were those presiding at the Petty Sessions of the district where Sir W. Gilbey resided. If he did not reside at Enniskillen, the Court ought not to make a futile and misleading order, compelling the Justices to adjudicate on an application which they would have no jurisdiction to grant.

The words "residence" and "place of abode" are flexible, and must be construed according to the object and intent of the particular legislation where they may be found. The cases on the subject are conveniently collected in Stroud's Dictionary and Maxwell on Statutes. Primarily, they mean the dwelling and home where a man is supposed usually to live and sleep. This is their interpretation in registration: *Reg.* v. *Hammond* (1); in liquidation under the Act of 1869: *Ex parte Jerningham* (2); and in Poor Law settlement. They may also include a man's business abode, the place where he is to be found daily: *Ex parte Breull* (3).

(1) 17 Q. B. 772. (2) 9 Ch. D. 466. (3) 16 Ch. D. at p. 487.

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They have this meaning in the Bills of Sale Act: *Hewer* v. *Cox* (1), and *Blackwell* v. *England* (2): see the judgment of Erle, J. In these cases personal presence seems an ingredient. To make the business house a residence it must be not merely a place where business is transacted, but where the trader's duty and occupation would lead one to expect that, under ordinary circumstance, he would be found. Examples of both meanings, the more restricted and the more expanded, are supplied by our Common Law Procedure Acts. Our Licensing Code has been interpreted in practice in the larger sense. Lord Macnaghten, in a case at Petty Sessions, which was brought before this Court but afterwards dropped, seems to have held that this was wrong, though the fact that the same Court which certifies as to character has also to certify to the suitability of the premises, may to some extent supply an argument in its favour. No such point is now before the Court. Interpreting the term in its most extensive sense, we cannot treat "residence" as convertible and identical with "ownership." A domiciled Australian, who never saw or intended to see Ireland, might succeed to or acquire property in this country which (among other uses) might be adapted to the business of a spirit-grocer; but it would be a manifest abuse of language, without warrant in dictionary, law, or usage, to describe such permanent absentee as resident here, merely by virtue of such ownership.

The premises in this case are vested either in the Limited Company out of the jurisdiction, or in Sir W. Gilbey as trustee for such Company. It is the Company which will own the business. Are we to say that every director or trustee of a Company resides in every business establishment where the Company may happen to carry on business?

Again, no one can suppose that Sir W. Gilbey, who is permanently resident in England, thinks of coming to Enniskillen to live, or that he intends to exercise any personal control or supervision over the business there.

If the possession of a house suitable for trade is in all cases sufficient, why does the Act of 1864 refer to residence at all? It plainly assumes that the applicant must be already resident within

(1) 3 Ell. & Ell. 428. (2) 8 Ell. & Bl. 541.

the district before, and without regard to the fate of, the application. It is certain that if the application fails no business will be carried on by Sir W. Gilbey on the premises; even if the use of the premises for business purposes might constitute residence, there was no existing business here; there is only a bare intention to trade as a spirit-grocer in future if the application was granted. Unless residence is the same thing as ownership, Sir W. Gilbey was not resident, even assuming in his favour that he was beneficial owner in his own right.

He is no doubt of high character and admirably qualified to be entrusted with a spirit-grocer's licence, which for some reason he wishes to be issued in his own name, and not a manager's. But if he does not reside in the district, how can the police object or the Justices certify? Character is a personal thing and can only be attested where a man is known. As this point as to residence was not made distinctly below, I have had some difficulty in disposing of the case on that ground; but I think it best not to protract litigation where there is no possibility of useful result, and where the order of the Court for *mandamus* might be interpreted by the Justices as inviting them to exercise a jurisdiction which they do not possess. The decision may seem technical, but it is of much more importance to hold the rule of law straight than, from a feeling of the supposed hardship of any particular decision, to interpose relief at the expense of introducing a precedent full of inconvenience and uncertainty in the decision of future cases: *Reg.* v. *Bolton* (1). The Court ought not to expunge residence from the statute merely because no mischief would result in this particular case from doing so.

O'BRIEN, J.:—

Upon a motion for *certiorari* and *mandamus* in respect of an order made by Justices in a licensing case, which was in the terms "no jurisdiction, the applicant not coming within the definition of spirit-grocer within the Act," three of the Justices who have shown cause allege that there was a mistake in the entry of the order, and that the order made was simply "no jurisdiction." It

(1) 1 Q. B. at p. 76.

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is not easy to see what advantage they could gain by the success of this contention; for, if the decision were that there was no jurisdiction in the proper sense—which means that there was no right to entertain the application at all,—that would amount to a case of declining jurisdiction, which upon the admitted facts in the affidavits would be sufficient ground for the interference of this Court; while, it is clear, if there was no authority to grant the application because the person was not qualified, it is a direct decision refusing the application corresponding to "no rule" in the Superior Court, and the reason is correctly assigned in the order as entered, even if the reason were not large enough to admit the objection of residence, or could exclude the parties maintaining the order from going into the want of any qualifying condition. As the Crown has joined in the cause shown, and properly, on general rules, to sustain Justices in submitting a legal question to the Court, it is not necessary to enter into the dispute whether it is the right of individual Justices forming a minority of the Bench to assume to act for the whole body in obedience to an order to show cause, which may become a very critical and embarrassing question in view of the elements lately introduced into the tribunal of Justices, whether there is in such a case cause shown at all which the Court can entertain.

With respect to the point, suggested by Mr. Justice Gibson, that, the place of business being admitted really to belong to a limited Company, it could not give a residence within the statute to certain individuals of the Company who are the applicants, two observations are capable of being made: first, that the objection is not within the reason assigned by the Justices, because residence is not part of the "definition" of the applicant, which means something adhering to him wherever he goes, and not collateral and accidental; and, secondly, as to what ought to be the effect of that circumstance upon the interference of the Court. In cases stated by magistrates it certainly is the practice to entertain objections that are not stated, though different considerations arise from the nature of *certiorari*, which is a proceeding to remove something that is of record. But it would appear to be manifestly within the authority of the Court to exercise the discretion that is still left to it, to refuse a *certiorari* which would be

merely nugatory in the result; and certainly it is part of its duty not to grant a *mandamus* to do what would be clearly illegal. As to the validity of the objection, however, I would be slow to admit that the distinction between the legal entity of a Company and the individuals who formed the Company, would prevent a residence being acquired sufficient to satisfy the statute, because it is consistent with the property in the Company that there is a licence to occupy or a retention of authority or right in the individuals, out of which a residence would arise, interpreting that term in the liberal sense which it is capable of having within the authorities. Mr. Henry has drawn our attention indeed to the language of the Act which requires the residence and also the place of business to be stated in the notice of application; but that I would take to be where there is a residence distinct from the place of business, and not as raising any implication against the latter being a residence in law. It is obvious there is reason for the police knowing where to find a person, in case the provisions of the licensing law are not observed. But, adopting fanciful solutions to meet fanciful objections, we may say on the other hand that Messrs. Gilbey may come to yield themselves to the law, and the law takes no notice of absenteeism if there be what is capable in law of being a residence. It is said that the applicant cannot give the notices required to the police of the district in which he resides, but that merely brings the matter round to the same question, What is a residence? And the clause requiring that he shall give the place of his abode, as well as that where the business is carried on, applies to the case where both exist, but does not determine that a person must have a residence other than the place of business.

Assuming these objections not to be fatal, we have to deal with a question which undoubtedly in its consequence is of the first importance. For in one result it may lead to the establishment all over the country of a new kind of licence not known to the law, namely, a licence to sell spirits not to be consumed on the premises, distinct from any other trade. Mr. Ronan did not, indeed, go to the length of saying that a person who is not a grocer can obtain the licence, but the question he argued was—What was the time to fulfil the condition, when he applied to the magistrates

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or when he comes to the Excise authorities? And certainly, if he can succeed in limiting the inquiry of the Justices to the question merely of the character of the applicant and the suitability of the premises, he stands a fair chance of being able to sail round the law. He stands a double chance, for the influence of the revenue may lead the Excise to be wholly indifferent, or they may say that it was a question for the magistrates and not for them. Is it therefore the law that any man may come to the magistrates and say, I have a proper house and am of good character—give me the certificate; and if they demand whether he is a grocer, can say that that is none of their business? There are formidable arguments on both sides. The original authority unquestionably belonged to the Excise alone. If it be suggested that the power may be abused, the answer is that the law always gave it to them. The section of the Act of 1872 is merely negative—it adds a condition that did not exist before, leaving the former authority otherwise as it stood. The words give no affirmative jurisdiction to the Justices. They are that "it shall not be lawful for any Excise officer to grant the licence." We were pressed strongly with the argument that it ought not to be considered the law intended to take away the authority the Excise before possessed, otherwise than in requiring the certificate, and a statute of 1845 (8 & 9 Vict. c. 64) was referred to, as carrying on that authority to a later period, by a proviso that nothing therein contained should interfere with the rights of spirit-grocers. But the rights of spirit-grocers are not interfered with by the question in what way they shall become spirit-grocers. However, this whole argument is open to the observation that, in the result of the struggle between the interests of the revenue and of public order and morals, the Legislature has seen proper, over a considerable period of time, to place all classes of licences, including spirit-grocers', as to hours of sale, regulations, certificates, penalties, proceedings, under the direct authority of the police and the magistrates. The Act of Geo. 4, which still governs the matter, says a person who is licensed to sell certain articles shall be entitled to take out a licence to sell spirits. Have the magistrates no implied authority to ascertain an inherent matter of condition in the person making the application, whether he be a grocer at all? Mr. Ronan says

not. The subjects of inquiry, he contends, are laid down for them by the statute; they can inquire about his house or his character. Further, he says, the time has not come to fulfil the condition. He may become a grocer before he goes to the Excise. He may be preparing in the meantime. He may have his cargo of pepper on the way from Sumatra. Moreover, he says, the applicant has a right to take his time to consider whether he will embark in the responsibilities of the pepper business. The magistrates were ready for this point; they wanted to know whether Sir Walter Gilbey was going to become a grocer. Of course he said he was not, without stopping to object to an inquiry as to a person's intentions. Counsel contends that in this state of things there was no answer to his application. *Sed non allocatur.* If a minister of religion applied, would he be entitled? If the person carried on a wholly different trade from a grocer, would he be entitled? The Justices must certify to the suitability of the premises. Suitability to what? To the joint trade, that of a spirit-grocer. Can they do that where there is no trade already carried on? Suitability for one trade may be a different thing from suitability for both. These difficulties all come from the effort not to read words in their plain and obvious sense—that a person who is licensed to sell groceries may take out a spirit licence, means a person who is then licensed, and that the "then" means the time when he applies to the magistrates. The last argument to my mind is conclusive—that there is no example known to the law where the machinery of a legal tribunal is put in motion for a purpose that may afterwards become wholly nugatory—where all the conditions that are necessary to give its order efficacy do not at the time exist. This is a principle, I think, absolutely without exception. Messrs. Gilbey might change their mind—they might throw up the certificate, and then we would have the Justices made fools of for nothing.

This view of the law is in accordance with the practice of the Excise authorities. They never go behind the certificate. The form of the spirit-grocer's licence speaks of the applicant as "being a person duly licensed to vend" the articles named in the definition of a grocer in the Statute. They do not ask to have the licence produced, or otherwise ascertain whether there is a

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licence at all in existence. To the question, How do you know the party is a grocer at all? the answer was that this was for the magistrates. So says the law in my opinion; and therefore the *certiorari* cannot be granted—a conclusion against which the circumstances would lead one to contend, considering that it appeared on the affidavits that three of the Justices had already taken part in refusing the ordinary publican's licence, to which the same objection did not exist.

SIR P. O'BRIEN, L.C.J.:—

This is a case of difficulty—difficult in itself—and rendered still more difficult to me by the fact that my brethren differ in their reasons. When the main point was first opened in argument, I confess that I thought that Mr. Ronan had no case; but when I heard him and Mr. Campbell, I changed my mind, and have arrived at the conclusion, certainly—not without hesitation, having regard to the judgment just read by my brother O'Brien, which he allowed me the opportunity of perusing—that this matter of dealing in tea, cocoanuts, &c., is not for the magistrates. The question turns mainly on the 9th section of the Act of 1874, which provides "that in the case of a new Excise license or transfer of an Excise license under this section, the certificate shall be to the good character of the person applying for the same and to the suitability of the premises." "Character" there means general character, and involves the consideration whether the applicant is a person of good repute; "suitability of the premises," in the case of a new licence, must refer to something future—the use that is proposed to be made of the premises as a spirit-grocer's shop. But I cannot see anything in these words conferring a jurisdiction on the Justices which they did not possess before to entertain this question of a previous dealing in tea, cocoanuts, or the other specified articles. I must acknowledge that I was surprised to find, on a more careful study of the Acts, that this is so. However, I cannot agree with Mr. Ronan upon the question of residence. Mr. Henry argued this branch of the case very elaborately. He urged that the objection on the ground of non-residence was fatal, and therefore the Court should not grant a writ of mandamus, which must be merely nugatory.

It seems to me that there is no answer to this, and that it would be useless to direct the writ to issue when the result must be that the Justices are of necessity bound to refuse the certificate.

Sir Walter Gilbey candidly says that he has not the remotest intention of coming over to reside in Enniskillen; indeed, it would be no less unlikely to expect this than if we were to expect that he intended to take up his abode at Belmullet or some equally out of the way place. The fact, however, is before us that he has no residence in the district, and that he disclaims all intention of coming to this country. Nevertheless he has chosen to apply for the certificate and licence in his own name instead of in the name of some manager whom the police could have under observation, and whom they could make directly amenable as the licencee of the premises. Mr. Justice Gibson has dealt fully with the various statutory enactments which bear upon this point, and I agree with him as to their effect. Upon the other matter I may have some doubt, but upon this point of residence the law is, in my opinion, clear, and it would accordingly be useless to allow the writ to issue.

Solicitor for applicant: *C. F. Falls.*
Solicitor for the Justices: *James Riordan.*

R. J.

Appeal.
1896.
Nov. 16, 17.
1897.
June 15.

MEEGAN *v.* BELFAST AND COUNTY DOWN RAILWAY COMPANY (1).

(1896. No. 520.)

Practice — Costs — Railway Company — Passenger — Personal injury — Negligence of Company's servants — Action for wrong not disconnected with contract — Common Law Procedure Act, 1853, *s.* 243 — *Common Law Procedure Act*, 1856, *s.* 97 — *Judicature Act, s.* 53 — *G. O. LXV., R.* 4.

In an action against a Railway Company for personal injury the statement of claim alleged that the plaintiff suffered damage from the defendants' negligence in carrying the plaintiff as a passenger by railway, causing personal injuries to the plaintiff:—

Held, that the action was not for a wrong disconnected with contract.

The plaintiff, while a passenger on the defendants' line from Knock to Belfast, on the 29th of November, 1895, was injured by a collision near Belfast, and brought the present action to recover damages for the injury.

The statement of claim consisted of one paragraph only:—"The plaintiff has suffered damage from the defendants' negligence in carrying the plaintiff as a passenger by railway from Knock to Belfast, causing personal injuries to the plaintiff in a collision near Belfast on the 29th of November, 1895."

The plaintiff obtained a verdict for £15. On the costs being lodged for taxation, the defendants served a notice of objection, stating that they objected to the allowance of any costs to the plaintiff (save the fee paid to the special jury), because on taxation the action should be treated as one of contract, the amount recovered being under £20, both plaintiff and defendants in the action residing in the same civil bill jurisdiction. The Taxing Officer allowed the plaintiff the costs of the action, subject to the

(1) Before Lord Ashbourne, C., Sir Peter O'Brien, L.C.J., and Fitz-Gibbon, and Walker, L.JJ.

provisions of Order LXV., Rule 64 (41) (42), as it seemed to him that, having regard to the amount recovered, the case could have been brought in the County Court. The defendants applied to the Exchequer Division to review the taxation, and that their objection to the costs should be allowed, and the Exchequer Division, by order dated the 27th of October, 1896, declared that the plaintiff was not entitled to any costs, save the costs of the special jury, and directed the certificate of the Taxing Officer to be amended accordingly. From that order the plaintiff appealed.

R. F. Todd, for the appellant:—

This was an action of tort. It was not necessary for the plaintiff to prove a contract in order to recover, and consequently this was an action disconnected with contract: *Taylor* v. *Manchester, Sheffield, and Lincolnshire Railway Co.* (1); *Kelly* v. *Metropolitan Railway Co.* (2). In several cases passengers have recovered damages who, though they had no ticket, were entitled to travel: *Marshall* v. *York, Newcastle, and Berwick Railway Company* (3), where a servant was injured for whom his master took a ticket; *Austin* v. *Great Western Railway Company* (4), where a child under three years old was injured. These were all treated as actions of tort. In several other cases actions of negligence against Railway Companies have been treated as actions of tort: *Pontifex* v. *Midland Railway Company* (5). Actions for negligence in the carriage of goods are actions of contract: *Fleming* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (6); *Bryant* v. *Herbert* (7). None of the Irish decisions have dealt with the case of injury to passengers: *Kerr* v. *Midland Great Western Railway Company* (8); *O'Sullivan* v. *Dublin, Wicklow, and Wexford Railway Company* (9); both these are cases relating to the carriage of goods. The practice in the two countries should be the same, and the two recent decisions by the Court of Appeal in England are strongly in the plaintiff's favour.

(1) [1895] 1 Q. B. 134.
(2) *Ibid.* 944.
(3) 11 C. B. 655.
(4) L. R. 2 Q. B. 442.
(5) 3 Q. B. D. 23.
(6) 4 Q. B. D. 81.
(7) 3 C. P. D. 389.
(8) 10 Ir. C. L. R. App 45.
(9) I. R. 2 C. L. 124.

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Campbell, Q.C., and *Bates*, for the defendants :—

The English decisions do not apply in Ireland, because they were pronounced upon a section of a statute which is worded differently, the County Courts Act of 1888. In England the cases are divided into actions of contract and actions of tort, in Ireland into actions of contract and actions of wrong or injury disconnected with contract. Accordingly, in Ireland, an action against a Railway Company for negligence has always been held to be an action not disconnected with contract : *Kerr* v. *Midland Great Western Railway Co.* (1); *O'Sullivan* v. *Dublin, Wicklow, and Wexford Railway Co.* (2); *Quane* v. *Frazer* (3). There are cases in England which decide that such an action is an action of contract, e. g. *Fleming* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (4) ; *Buxton* v. *North-Eastern Railway Company* (5) ; *Legge* v. *Tucker* (6) : that was an action against a livery stable keeper, because a horse was hurt. *Powell* v. *Lathom* (7), *Austin* v. *Great Western Railway Company* (8) were decided on the basis of contract; see *Baylis* v. *Lintott* (9). The English division is not mutually exclusive, but overlaps as to a number of actions. As to such actions the English decisions have varied—sometimes classing them as torts, sometimes as contracts. The difficulty in England has been terminated by the recent decisions of the Court of Appeal in England, relied on by the appellant, which were pronounced for the purpose of terminating a difficulty which never arose under the Irish statutes. The Irish division is logical and mutually exclusive, as the first member of the division, by the terms of the second member, should be construed to cover actions of wrong or injury connected with contract.

Again, in the practice of substitution of service either under the Common Law Procedure Act or the Judicature Act, service of writs has often been substituted on a Railway Company ; this has been done on the basis that the action is one of contract : *Aston*

(1) 10 Ir. C. L. App. 45.
(2) I. R. 2 C. L. 124.
(3) 16 Ir. C. L. R. App. 13.
(4) 4 Q. B. D. 81.
(5) L. R. 3 Q. B. 549.
(6) 1 H. & N. 500.
(7) 2 N. R. 365.
(8) L. R. 2 Q. B. 442.
(9) L. R. 8 C. P. 345.

v. *London & North-Western Railway Company* (1); *Macken* v. *Ellis* (2); *Willis* v. *London & North-Western Railway Company* (3).

June 15.

LORD ASHBOURNE, C.:—

This is an appeal from an unanimous decision of the Exchequer Division upon a question in reference to the taxation of the costs of the action. It was argued upon a former occasion, and, having regard to the importance of the subject in the Common Law Divisions, we directed the question to be re-argued before the Court, and we requested, and have been fortunate enough to secure, the attendance of the Lord Chief Justice.

The action was brought by the plaintiff to recover damages against the defendants for injuries received as a passenger on their line. The endorsement on the writ states:—"The plaintiff's claim is for damages for injury to the plaintiff while a passenger on the defendants' railway by the negligence of the defendants' servants." The plaintiff recovered less than £20, and a contest arose as to the basis upon which the plaintiff's costs should be taxed. When the plaintiff's costs were lodged for taxation, the defendants filed an objection to the following effect:—"The defendants object to the allowance of any costs to the plaintiff, save the fee paid to the special jury, because on taxation it should be treated as an action of contract, the amount recovered in the action being under £20, both plaintiff and defendants residing in the same civil-bill jurisdiction." When the matter came before the Taxing Officer he considered the question with a great deal of care, and gave it full consideration in all its bearings. This is his report:—"I adopted the contention of the plaintiff's counsel and allowed to the plaintiff the costs of the action, subject however to the provisions of Order LXV., Rule 64 (41) (42), as it seemed to me that, having regard to the amount recovered herein, this case could have been brought in the County Court."

(1) I. R. 1 C. L. 604. (2) I. R. 8 C. L. 151. (3) I. R. 10 C. L. 95.

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As I have stated, the action was brought to recover damages sustained by the plaintiff as a passenger on the defendants' line by reason of the negligence of the defendants' servants. On appeal to the Exchequer Division the defendants' counsel argued that the action was not disconnected with contract, and that, less than £20 having been recovered, the Taxing Officer was wrong. The Exchequer Division decided that, having regard to the Irish practice, they were bound to hold this to be an action not disconnected with contract, and that the plaintiff was not entitled to any costs. There is nothing like public spirit; and the plaintiff, actuated by public spirit, deemed it right to bring this appeal to upset what has hitherto been the practice of the Irish Courts in cases of this description. There is a mass of Irish decisions on this point, all in conformity with each other, pronounced by Judges of the highest eminence, and no Judge in this country has ever expressed disapproval of them. It has been urged, however, that two recent decisions of the English Court of Appeal should unsettle and disturb the Irish practice which had continued for so long, and the uniform current of Irish decisions. That might be reasonable, provided we were dealing with the same subject-matter and the same legislation. The Irish statutes contain two categories—actions of contract, and actions of wrong or injury disconnected with contract. It is obvious that the last words "disconnected with contract" are of immense importance, because it is clear there are many cases in which it is not easy to say that they are all contract, or all tort. There are many cases which touch one another closely.

It is manifest that in cases like the present, against a Railway Company, it is necessary to have clear views on this subject, because there are many cases where actions are brought against Railway Companies for damages, for personal injuries, by persons who are upon the premises of the Company without any right at all; sometimes they are brought by persons who are there by permission, custom, or usage, as licensees, and sometimes by persons who are there by contract. Those persons may be regarded as trespassers, or licensees, or there by contract. The case may be one of pure wrong, or a wrong disconnected with contract. It is obvious that these are matters which must occur

in human affairs very often. Where a wrong or injury has been sustained, it has to be grouped either with a contract, because it is not disconnected with contract, or a tort because not connected with contract.

These matters are all to be found at pages 361 to 364 of the Common Law Procedure Acts by Bewley and Naish, which state the Irish decisions on this subject. They are a series unbroken and unanimous. In *Kerr* v. *Midland Great Western Railway Company* (1) an action was brought against a carrier for loss of goods, and all the topics came up for discussion. The Railway Company was sued for negligence, but they had made a contract. The case was decided by the Court of Common Pleas. Monahan, C.J., in a short judgment, in his clear and masterly manner, decided that it was not a wrong disconnected with contract, that the substantial cause of action was contract, and therefore that it came within the contract section. It was negligence, but committed at a time when connected with contract, and therefore was grouped with contract. Then comes *Quane* v. *Frazer* (2). That was an action for negligence by a client against a solicitor, in which all these topics were discussed again. The Judges were Lefroy, C.J., O'Brien, J., and Fitz Gerald, J. Lefroy, C.J., left before the judgment was pronounced, but he concurred with the other Judges; and O'Brien, J., in a most careful and elaborate judgment in all its bearings, gave a most convincing judgment, and decided that, though there was a wrong, it was not disconnected with contract, that the very words of the Irish Act were put in to apply to such cases, and such cases were not to be grouped with mere wrongs and injuries. There are numerous other Irish cases not necessary to refer to. *O'Sullivan* v. *Dublin, Wicklow, and Wexford Railway Company* (3) was a case against a Company as a common carrier for damages to goods; it was framed in tort. There were, however, always numerous counts in contract and in tort in a claim against a Railway Company. The advisers of the plaintiff endeavoured to get a finding on the tort counts in case they did not get £20 on the contract count. Again, Monahan, C.J., said that he would look to the substance

(1) 10 Ir. C. L. R. App. 45. (2) 16 Ir. C. L. R. App. 13. (3) I. R. 2 C. L. 124.

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of the action—not to the device of the pleader, and there he found that, though it was clearly a wrong or injury, its substance was contract, the foundation of the action was contract, and therefore it was a wrong or injury not disconnected with contract.

There are numerous English cases which go to show that the Irish view is the right one: but the only one I shall mention is *Fleming* v. *Manchester, Sheffield, and Lincolnshire Railway Co.* (1). That was a case in the Court of Appeal in England in which Bramwell, L.J., delivered the judgment of the Court. Any one who remembers Lord Bramwell will remember how bold a speaker he was. One has only to read this judgment to see he was speaking with unwonted caution. That was an action against a Railway Company sued as a common carrier for loss of goods, and Lord Bramwell said it was an action he should regard as founded on contract; *a fortiori* he would have said so in Ireland. In *Fleming's Case* (1) the conclusion arrived at was that the action was an action of contract, because the real ground of complaint was the breach of the contract to deliver. Our own Judicature Act, section 53, is not without bearing, because the Legislature must be presumed to have known the state of the law when they proceed to legislate about it, and these provisions were enacted at a time when *Kerr* v. *Midland Great Western Railway Co.* (2) and *Quane* v. *Frazer* (3) were the settled law of Ireland. The Legislature preserved that state of the law by using these words:—"Subject to all existing enactments limiting, regulating, or affecting the costs payable in any action by reference to the amount recovered therein, the costs of every action, question, and issue tried by a jury shall follow the event, unless upon application made, the Judge at the trial or the Court shall for special cause shown and mentioned in the order otherwise direct." That is a very important provision in the Irish Judicature Act, and it throws an amount of light on the question of the settled practice of the Courts by preserving the existing rule as to costs, as settled by these decisions.

Now turn to England for a moment—there is a different

(1) 4 Q. B. D. 81. (2) 10 Ir. C. L. R. App. 45. (3) 16 Ir. C. L. R. App. 13.

statute in England—the County Courts Act of 1888. It makes two categories also. There must be either an action *founded on contract*, or an action *founded on tort*, and the Courts have to classify the cases according to their own reason or discretion, and they often have difficulty in saying what are *founded on contract* and what are *founded on tort*. The decisions in England can hardly be said to be very clear or very consistent. But in 1895 two cases were decided which have led to the chivalry of the present appeal. In *Taylor* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (1) a decision of the Court of Appeal, consisting of Lindley, L.J., and Smith, L.J.—Judges of the highest eminence—a passenger with a ticket on the defendants' railway sustained personal injury by the negligence of the defendants' servants. Smith, L.J., gave a judgment, which of course must be treated with the highest respect, on the English code. He held that under these circumstances, though the passenger took a ticket and though there was a contract, they would group it with actions of tort, and though £20 only was recovered they would give full costs there, because the action was founded on tort, not on contract.

The other case is *Kelly* v. *Metropolitan Railway Co.* (2), which was an action brought by a passenger against a Railway Company for personal injuries while travelling on the line; and the Judges, Lord Esher, and Smith and Rigby, L.JJ.—all Judges also of the highest authority—adopted the same conclusion in reference to the facts appearing in the case. There again a passenger who had taken a ticket for a journey on a railway was injured, and the Court held that it was an action founded on tort, and not on contract. That was a decision arrived at after full argument and grave consideration. I am by no means sure that the decision would have been the same had the words in the English statute been the same as ours. I do not discuss those two cases; they are, on their own code, to be accepted with the greatest respect and highest loyalty. But the Irish statutes are different in their language, and they warrant the decisions pronounced upon their sections.

(1) [1895] 1 Q. B. 134. (2) *Ibid.* 944.

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I see no reason to disturb the settled decisions under our code and the settled practice in Ireland, and therefore this appeal should be dismissed with costs.

SIR PETER O'BRIEN, L.C.J. :—

I concur. A practice which prevailed for forty years should be altered only for very clear and coercive reasons. This practice has not silently grown up, it is not merely the practice of Taxing Masters, but it has in several cases received the sanction of judicial opinion. What are the facts of the case before us? The plaintiff was a passenger on the defendants' railway, under a contract to carry her from Knock to Belfast. She was not there by mere permission. The way in which she became a passenger was by entering into a contract with the Company to be carried for a money payment, and the duty of the Company to carry her with reasonable care sprung in the particular case from the fact of the plaintiff being a passenger under a contract to be carried. I wish to emphasize how in my opinion the precise character of the duty arose, because I think some confusion exists in the case as regards this matter. To be explicit, the measure of the duty of a Railway Company in the case of a passenger who pays for this carriage is one thing, the measure of the duty of the Company towards a passenger who is a mere bare licensee is another. A person who gets what in vulgar parlance is called "a lift," must take the train as he finds it, and must rest satisfied with the exercise of whatever skill the Railway Company's servants possess. On the other hand, a passenger under a contract for money payment is entitled to the exercise of reasonable care and skill by the Company's servants. The right of the passenger and the correlative obligation of the Company are, in the cases I put, palpably very different. What causes the difference? The existence of a contract for a money payment in the one case, and the fact of there being only a bare permission in the other. The existence of a duty towards passengers arises from the fact of he or she having been received as a passenger, but the precise character depends upon how he or she became a passenger. Was it under a contract for a money payment, or was it by mere permission? Now, if the measure of the duty is different in different cases, it is by

reason of the fact that there was in one case a contract of carriage for a money payment, and in the other case there was not. The determining factor is the contract, and upon it depends the nature of the duty, and the degree and character of negligence, which must be established at the trial. We look at the contract to see the measure of the duty, and to ascertain the degree and quality of the negligence which the duty involves? If that be so, can it be said that the wrong or injury for which redress is sought is "disconnected" with contract? In this particular case the measure of the duty, which was an unchangeable thing of a uniform character throughout, depended upon the contract, and the wrong or injury complained of arose from the breach of the duty so depending. A contract in the particular case did exist; the character and extent of the duty due to the plaintiff in the particular case, and under the actual circumstances, depended upon the contract which so existed, and the breach of the duty so arising was the negligence complained of. Can it be said that this is a wrong or injury disconnected with contract? I think not. We must go back in the actual facts of this case to the contract to ascertain the character and extent of the duty, the breach of which constituted the negligence complained of. We must regard the actual facts. We must regard the true position. We must find out how the plaintiff was in the train. We are not to concern ourselves with a different state of facts; we cannot regard the plaintiff merely as an individual sitting in a train: we must ascertain how she came there, and once we do this we find that she was a passenger under a contract of carriage for a money payment, and this being ascertained, we know the limits of the duty of the Company, the breach of which, as I said, constitutes the negligence complained of. How, then, can this matter be said to be disconnected with contract, when the character of the duty, the breach of which constitutes the negligence in the particular case, depends upon the contract which has been entered into. In *Hearns* v. *Lancashire & Yorkshire Railway Company* (1), Christian, L.J., is reported to have said:—"The Irish Common Law Procedure Act excuses us from considering the form of action, and if this was not a wrong

(1) 7 Ir. Jur. (N. S.) 378.

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independent of contract, but a wrong connected with contract, it may come under the head of contract, and be governed accordingly."

No doubt the case in which this observation was made was not one for personal injuries: it was one for the loss of goods; but the language of the Lord Justice was general, and would apply equally to goods or passengers under a contract of carriage. There would be in either case a contract. The full Court of Common Pleas in that case held that the plaintiff, who recovered only £15, was entitled only to half costs. That case was decided so far back as 1862. It followed a previous case, decided in the same Court, and has since been adopted by the Court of Common Pleas in the cases of *Kerr* v. *Midland G. W. Railway Co.* (1), and *O'Sullivan* v. *Dublin, Wicklow, & Wexford Railway Co.* (2). In the latter case Monahan, C. J., said:—"The question does not depend upon the form of the pleadings. The only intelligible rule is that, where the *foundation* of the action is in contract express or implied, the plaintiff should be entitled to only half costs, if the sum recovered is less than £20. The goods were originally delivered to be carried; the violation of that obligation would entitle the plaintiff to maintain an action of *assumpsit*; and the fact that the plaintiff grounds his claim on a breach of duty, not a breach of contract, and joins a count in trover, does not change the nature of the original action, which is not disconnected with contract within the 243rd section of the Common Law Procedure Act." In my opinion this judgment of Monahan, C. J., would equally apply to the case of a passenger who has made a contract for a money payment. There is a contract in both cases, equally connected with the wrong or injury complained of.

Monahan, C. J., refers expressly to section 243 of the Common Law Procedure Act, and during the argument in *Hearns' Case* (3) inquired—Were the words "disconnected with contract" to be found in the English Act? The decisions in the Court of Common Pleas in this country were adopted by the Court of Queen's Bench in the case of *Quane* v. *Frazer* (4). That case was brought against an attorney for breach of duty arising upon a retainer, and it may, perhaps, be argued that the cause of action

(1) 10 Ir. C. L. R. App. 45.
(2) I. R. 2 C. L. 124.
(3) 7 Ir. Jur. (N. S.) 378.
(4) 16 Ir. C. L. R. App. 13.

was more directly founded upon contract; but I think the judgment of O'Brien, J., who pronounced the unanimous judgment of the Court, went in its reasoning the full length of deciding this case in the defendants' favour. He expressly adverts to the decision of Monahan, C.J., in *Kerr* v. *Midland G. W. Railway Co.* (1) It is quite plain that Monahan, C. J., was largely influenced by the words "disconnected with contract," which appear in our Act of Parliament, and are not to be found in the English Act. In fact, he took the very distinction during the argument of *Hearns' Case* (2). Having regard then to the practice which has prevailed for forty years in our Common Law, to the decisions in this country to which I have referred, and to the difference in phraseology between the Irish and the English Acts, I think I should not be called upon to follow the decisions in *Taylor's Case* (3) and *Kelly's Case* (4) in the English Court of Appeal, even were I entirely satisfied with the line of reasoning pursued in these cases. Before I conclude, however, I desire to point out that the 53rd section of the Judicature Act proceeds on the hypothesis of the continued existence unaltered of the section of the Procedure Act of 1853, which we are now construing. When the Judicature Act was passed, the practice, which is now sought to be altered, had been firmly established. It is only reasonable to suppose that the Legislature, which did not alter that practice, intended to leave it as it found it—a presumption arising with peculiar force in the present case. The Judicature Act from its nature may fairly be presumed to be the handiwork of lawyers, and it is not too much to suppose that lawyers were not unacquainted with what is sometimes described as the burning question of costs. I concur in thinking that the judgment of the Exchequer Division should be affirmed.

FITZ GIBBON, L. J.:—

The decisions in England appear to me, to have justified Mr. Todd in bringing this appeal. The matter is very important, especially to Railway Companies. We have fully considered it, and we have asked the head of the Common Law Division to assist

(1) 10 Ir. C. L. R. App. 47.
(2) 7 Ir. Jur. (N. S.) 378.
(3) [1895] 1 Q .B. 195.
(4) *Ibid.* 944.

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us in deciding it. Before deciding that we ought to follow the English decisions, we should see that the legislation in the two countries is the same; or rather, we should be satisfied that the Irish decisions, and settled practice, are wrong upon the Irish statutes. I have come to the conclusion that the Irish decisions are right, and that we ought to adhere to them, upon the construction of the Irish Acts, and upon grounds which do not necessarily affect the English cases. But I am bound to say, further, that I cannot reconcile the English decisions with each other, nor can I altogether understand, or follow, the distinctions and definitions attempted in *Taylor* v. *Manchester, Sheffield, and Lincoln Railway Company* (1) and *Kelly* v. *Metropolitan Railway Company* (2).

The difference between the language of the English and the Irish codes is neither new nor unconsidered. The Irish Common Law Procedure Act, 1853, s. 243, contains the very same words which are contained in the existing rules under the Judicature Act, and these words were, in the meantime, repeated in the Common Law Procedure Act, 1856, sect. 97. The Judicature Act, 1877, s. 53, expressly affirmed "all existing enactments limiting, regulating, or affecting the costs payable in any action by reference to the amount recovered therein," and at that time the Irish practice was settled by a consistent course of authority and practice. Therefore, when Parliament, in 1877, confirmed the existing enactments, it should be taken to have done so as those enactments were then interpreted by decisions and were then administered in practice. The Rules of 1891 have again confirmed the settled law and practice, by repeating the use of the same words.

It is impossible to draw any legal distinction, for the present purpose, between actions for injuries to goods and to passengers. In both cases the essence of the contract is the same, and the cause of action may be stated either in contract or in tort, though, in the case of goods, the breach of the contract of carriage usually covers the whole cause of action, whereas, in the case of an individual, the personal injury is usually more serious than the failure to bring the passenger to his destination. Still, wilful or negligent injury to goods is actionable, as a wrong outside the

(1) [1895] 1 Q. B. 134. (2) *Ibid.* 947.

carrier's contract: and, on the other hand, in some cases—such for example, as cases of special damage through loss of market, loss of through passage, or the like—the measure of damages would be different, and might even be larger, for a breach of contract, than for actual injury, as well in the case of goods as of passengers.

While the Irish legislation has consistently adopted the division into—1, "actions of contract," and 2, actions for any *wrong or injury disconnected with contract*—the English legislation has been equally consistent in adopting "actions of contract" and "actions of tort" as the definitions of the two forms of action, which are distinguished as to costs. There is a recital in the English Common Law Procedure Act, 1850, s. 74, which shows that the difficulty of distinct definition was present to the minds of the framers of that tatute—"Whereas scertain causes of action may be considered to partake of the character both of breaches of contract and of wrongs, and doubts may arise as to the form of pleas in such actions, and it is expedient to preclude such doubts, any plea which shall be good in substance shall not be objectionable on the ground of its treating the declaration either as framed for a breach of contract, or for a wrong."

Two principles are clearly established in both countries. The first—all actions are to be divided into two categories. To be categories at all, the definitions must be adequate, distinct, and clear. The second principle is enunciated by Lindley, L.J., in *Taylor* v. *Manchester, Sheffield, and Lincolnshire Railway Co.* (1), namely, that "we are compelled to draw the line hard and fast, and put every action into one class or the other." The pleader cannot alter the facts, or the real nature of the case, by framing his pleadings one way or the other. But what are the two categories? In England the distinction is between an action *founded on contract* and an action *founded on tort*. That is not the case in Ireland; whatever is, in Ireland, not an "*action of contract*," is "an action for a wrong or injury *disconnected with contract*." The first category, "actions of contract," might even be wider than "actions founded on contract." But the other category contains *only* actions for wrongs "disconnected with contract." Therefore as

(1) [1895] 1 Q. B. 138.

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the categories between them are exhaustive, every action for a wrong or injury which is "not disconnected with contract" must be an "action of contract," within the meaning of the Irish statutes. We have to deal, speaking with logical precision, with a case of "dichotomy by contradiction." What is the meaning of a wrong or injury not disconnected with contract? It must be a wrong or injury, and therefore you may sue in *tort*; but the connection with contract appears, if you can sue only by reason of, or on proof of, your having had a contract with the wrong-doer. The cause of action, *ex vi termini*, is a wrong or injury; but if the plaintiff cannot prove his case without proving a contract, his action is not "disconnected with contract." You must look to the facts of each particular case, to find out whether the wrong is really, and in substance, disconnected with contract or not. I cannot see the materiality, for our purpose, of the distinction between a licensee and a person who has paid money for a ticket. I do not admit that *the nature or character of the duty* due by a Railway Company to a licensee differs from what is due to a passenger: *the measure or degree of care* may differ, and *the measure of damages* may differ, but *the nature of the duty* does not. In both cases the Company must use reasonable care to avoid injuring the person who, whether by license or for payment, is on their premises. I am not concerned, at present, to discuss the position of a trespasser, to whom no duty is due.

Furthermore, I fail to follow the distinction between "acts of commission or misfeasance," and "acts of omission or non-feasance," as supplying a test to determine whether the action by a person injured is or is not "disconnected with contract." Such a distinction would inevitably result in the absurdity that if a passenger was injured because a servant of the Company wrongfully opened the points at a junction, his right to costs would be different from what they would be if the points were wrongly left closed, or if the Company had omitted to provide a servant to open them.

I find it equally impossible to accept the contention that the form of action cannot be varied by the pleader, according as the facts warrant him in suing for the wrong irrespective of the contract, or, *vice versa*, in suing on the contract alone. If a passenger

were *en route* to America, and had a contract with a Railway Company to carry him to a port in time to catch a particular steamer, or if a Company contracted to carry goods in time for a certain market, am I to be told that if the passenger or the goods suffered some slight injury through the negligence of the Company, the action for the loss of the passage to America, or for the loss of the market, could not be brought as an action strictly of contract?

I should certainly hold that if the loss through the breach of contract is the more substantial cause of action, it can be sued for as such, and *vice versa*. But in the present case the personal injury is sued for as a wrong, and the wrong rests on a breach of a duty which arises from a contract, and the action therefore is not "disconnected with contract." It follows that the costs are not payable unless £20 is recovered.

Two further arguments weigh very strongly with me. We have already decided (*Daly* v. *Dublin, Wicklow, and Wexford Railway Company* (1)) that an executrix can bring an action against a Railway Company for the pecuniary damage to the personal estate of a deceased testator, even after she, as his widow, has recovered damages under Lord Campbell's Act. Such an action could only be maintained on the basis of contract; it could not be maintained as an action of tort, and the decision therefore seems to me to rest on the principle that a fatal injury to a passenger by negligence is a wrong "not disconnected with contract."

But the bearing of the decisions and the practice as to service of writs out of the jurisdiction is even more important. So long as the decisions stand under which actions against Railway Companies by passengers and owners of goods are treated as actions of contract, for the purpose of the rules as to service out of the jurisdiction, I cannot hold such actions to be "disconnected with contract" for the purpose of costs.

Under all these circumstances, I am of opinion that our safest course is to affirm the Irish decisions, and to follow what has hitherto, for very many years, been the uniform and established practice in this country.

(1) 30 L. R.I. 514.

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WALKER, L. J.:—

I concur; but I am not sorry that the case has received the very full investigation given to it. I do not think we should be justified in departing from a series of decisions of Judges of the greatest eminence in Ireland, on the language of our statutes, because in 1895 the Court of Appeal in England, after a conflict of authority, has definitely settled the law there as to the construction of what are different words to be found in different statutes.

I confess I think that there is strong reason for saying that the interpretation put by the Irish Judges on these Acts was right. I think it is important to see what was the origin of the language in our Act of 1853, for I think it is earlier than Mr. Campbell seemed to think, though not having my note before me, I could not give him the origin; but he disclaimed that, and insisted that the words were deliberately chosen in 1853, at earliest, to get rid of difficulties arising from English conflicting decisions. I do not think that is so; but I also think that the language first used in this country, and the character of the only change ever made in that language in Ireland, furnish an argument in support of the Irish view. The Irish legislation commences with 14 & 15 Vict. c. 57, s. 40, which provides that if "in any action in debt, covenant, detinue, or *assumpsit*, the plaintiff recover for debt or damages a sum not exceeding £20, or in any action of trespass, trover, trespass on the case (with certain exceptions), a sum not exceeding £5" he shall be entitled to only half costs. These are words copied from the English County Court Act of the previous year. What would be the result under these words? *Legge* v. *Tucker* (1) is an express authority under that section, where a livery stable keeper was sued for damages for injury to a horse which was in his keeping, and the action was held to be one of contract. Then, in 1853, when the Common Law Procedure Act was passed, the forms of actions ceased to be important and a change of language became necessary. The words chosen to represent both are "actions of contract" and "actions for any wrong or injury disconnected with contract," just as in the schedule to that Act

(1) 1 H. & N. 500.

we find two divisions, "actions of contract" and "actions for any wrong independent of contract." Where there is a contract, say by a passenger with a carrier, and injury results, you may get your entire remedy, either by an action of *assumpsit* for breach of the contract, or tort for neglect of the duty which is created by the contract; and if the tort gets its origin from the contract, when there is one, it is difficult to see how then it is "disconnected with contract," because a certain legal relation with a contract would impose a duty as extensive as that which the contract creates. There is a contract in fact. There is a consequent duty and there is an adequate remedy furnished by action for the breach.

In *Kerr* v. *Midland Great Western Railway Company* (1) and *O'Sullivan* v. *Dublin, Wicklow, and Wexford Railway Company* (2), Monahan, C. J., lays down that the words in our statutes were intended to apply to every case where a contract subsists between the parties, and the reasoning in *Quane* v. *Frazer* (3) is the same, though I think that decision might well stand with the English decisions, for the action would not have lain unless there were a retainer of the solicitor by the client.

Now let us see how the English legislation ran. The Act 9 & 10 Vict. c. 95 regulates the recovery of small debts, and provides (by s. 129) that if any action is commenced in the Superior Courts, for which a plaint might be entered in any Court under the Act, and a verdict found for the plaintiff "for a sum less than £20 if the said action is founded on contract, or less than £5 if it be founded on tort," such sum only shall be recovered and no costs, unless the Judge certifies that the action was one fit to be brought in the Superior Courts. The 13 & 14 Vict. c. 61 is the County Courts Extension Act, and by s. 11 it was enacted that—"If in any action commenced after the passing of this Act in the Superior Courts, in covenant, debt, detinue, or *assumpsit* (except an action for breach of promise of marriage), the plaintiff shall recover a sum not exceeding £20, or in trespass, trover, or case" (except five kinds of action specially mentioned), "the plaintiff shall recover a sum not exceeding £5; the plaintiff shall have

(1) 10 Ir. C. L. R. App. 45. (2) I. R. 2 C. L. 124. (3) 16 Ir. C. L. R. App. 13.

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judgment to recover such sum only and no costs," except in the case of a judgment by default, unless the Judge shall certify that there was sufficient reason for bringing the action in the Superior Courts. Then comes the 19 & 20 Vict. c. 108, the County Courts Amendment Act, which provides by s. 30 that where an action of contract is brought in one of the Superior Courts to recover a sum not exceeding £20, and the defendant in the action suffers judgment by default, the plaintiff shall recover no costs, unless upon an application to such Court or to a Judge of one of the Superior Courts, such Court or Judge shall otherwise direct. This translates the other branch of the words in 13 & 14 Vict. c. 61, in the same way as our Act of 1853 does. It was on this Act that *Tattan* v. *Great Western Railway Company* (1) was decided, a case which has been much canvassed. By 30 & 31 Vict. c. 142, s. 5, it was enacted that if in any action in the Superior Courts the plaintiff shall recover a sum not exceeding £20 if the action is founded on contract, or £10 if founded on tort, he shall not be entitled to any costs of suit unless the Judge certify that there was sufficient reason for bringing such action in such Superior Court, or unless the Court or a Judge at Chambers shall by rule or order allow such costs. The last Act to which I shall refer is the County Courts Act, 1888 (51 & 52 Vict. c. 43), which provides by s. 116 that if in an action *founded on contract* the plaintiff shall recover a sum less than £20, he shall not be entitled to any costs of the action, and if he shall recover a sum of £20 or upwards, but less than £50, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a County Court, and if in an action *founded on tort* the plaintiff recover less than £10 he shall not be entitled to any costs, and if he recover £10 and less than £20 he shall get no more than County Court costs. This Act thus recurs to the old language. In *Bryant* v. *Herbert* (2) Lord Bramwell makes it a ground of his decision that the language of 13 & 14 Vict. c. 61 had been departed from in the later statutes, so that he treats the difference of language as important, and in *Hearne* v. *Lancashire and Yorkshire Railway Company* (3)

(1) 2 Ell. & Ell. 844. (2) 3 C. P. D. 389. (3) 7 Ir. Jur. (N. S.) 378.

the difference between the English and Irish Acts is made the basis of decision by the Queen's Bench Judges. Thus in both countries the difference in language is made an important factor.

Further, our entire practice as to service of process is based upon a view inconsistent with the English authorities, and if we yielded to this appeal, we should be at once called upon to alter all the practice in many cases. I concur therefore that we should adhere to the law and practice so long settled in this country.

Solicitor for the plaintiff: *W. H. Arbuthnot.*
Solicitors for the defendants: *Johns, Bates, & Johns.*

R. D. M.

O'KANE *v.* BURNS (1).

Landlord and tenant—Land Law (Ireland) Act, 1881, *ss.* 3 *and* 5—*Subletting by judicial tenant—Void lease—Liability to rent or in use and occupation.*

A person who holds lands under a judicial tenancy cannot sublet them without the consent of his landlord; and if he purports to subdemise them by lease without such consent, the lease is void, and the person to whom the lease is made is not liable to be sued for the rent thereby reserved, either as rent or in use and occupation.

APPEAL by the plaintiff from an order of the Queen's Bench Division, dated 11th May, 1896, refusing with costs the plaintiff's motion pursuant to leave reserved at the trial for judgment in the action, and entering judgment with costs for the defendant therein.

The action was brought to recover the sum of £136 10*s.* for rent due by the defendant to plaintiff as administratrix of the will annexed of James Wilson Bradley under a lease dated the 5th December, 1892, made by James Wilson Bradley to the defendant, and reserving a rent of £78 per annum, and in the alternative to

(1) Before LORD ASHBOURNE, C., and FITZGIBBON, and WALKER, L. JJ.

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recover the said sum of £136 10*s.* for the use and occupation of the demised lands at a rent of £78 per annum.

The statement of claim which gave the particulars of the said lease and of the rent claimed in greater detail was read by the Lord Chancellor in giving judgment.

The lessor in the said lease, James Wilson Bradley, held the lands which he purported to demise thereby under a judicial tenancy, and the defendant pleaded amongst other defences that he would rely upon the provisions of the 3rd and 5th sections of the Land Law (Ireland) Act, 1881.

The action was tried at Londonderry before Lord Justice Barry on the 27th March, 1896. It appeared from the Judge's certificate that at the trial it was consented and agreed by counsel on both sides that there should be no jury, and that for the purposes of the action the facts should be taken as follows:—"One James Wilson Bradley was judicial tenant of the lands in question. He by lease dated 5th December, 1892, demised or purported to demise the said lands to the defendant for six years from 1st October, 1892. The defendant went into possession and paid to the said James Wilson Bradley the half year's rent due from 1st October, 1892. The said James Wilson Bradley died in August, 1893. The plaintiff is his administratrix with the will annexed. There is now unpaid of the said alleged rent the sum of £136 10*s.* from 1st April, 1893, to 1st January, 1895. The plaintiff as such administratrix sues the defendant for this sum, claiming it under the said lease or in the alternative for use and occupation. The defendant relies on the 3rd and 5th sections of the Land Law (Ireland) Act. The defendant claims credit for £25 head rent paid by him, which is admitted. The defendant continued in possession until 1st January, 1895; either party to be at liberty to move the Divisional Court for judgment."

The plaintiff, pursuant to the leave so reserved, moved the Divisional Court for judgment; but that Court refused the application, and made the order now appealed from.

Drummond, Q.C., and *Gallagher*, for the appellant:—

(*a*) The Statute Law Revision Act, 1874, has repealed the 7 Wm. 4, c. 29. The lease was therefore not illegal.

(*b*) The lease may be illegal, but the possession of the defendant was quite legal: *Ryan* v. *Byrne* (1). He was in possession of the premises as licensee of Bradley: *Littleton* v. *Macnamara* (2); he was therefore liable in use and occupation: *Dean of Rochester* v. *Pierce* (3); *Dawes* v. *Dowling* (4); *Howard* v. *Shaw* (5); *Hellier* v. *Sillcox* (6).

[They also cited *Manning* v. *Saul* (7) and *Fogarty* v. *Shanahan* (8).]

Henry, Q.C., and *Holmes*, for the respondent, were not called on by the Court.

LORD ASHBOURNE, C.:—

We do not think it necessary to call on counsel for the respondent, because, although we have been told that this precise question was never raised before this case came before the Queen's Bench Division, still, there has been a series of decisions on the code constituted by the Subletting Acts which has clearly interpreted the meaning and policy of the Legislature, and renders it almost impossible to find any aspect of the code which is not covered by authority. The last link in this chain of authority (*Fogarty* v. *Shanahan* (8)) lays down that there is to be found in the recent legislation the same stringency which characterised the old Acts, and that any subletting in violation of the statutory prohibition in the Act of 1881 is absolutely null and void.

The matter involved in this appeal arose at the trial of an action before Lord Justice Barry at the last Spring Assizes; and he at the request of the parties stated a case which was argued before the Queen's Bench Division, who unanimously came to the conclusion that the contention of the plaintiff could not be sustained.

The endorsement on the writ of summons states that "the plaintiff's claim is for £136 10*s*. for rent due by the defendant to the plaintiff out of a farm of land containing 15A. 2R. 20P. Cunningham measure, in the townland of Shantallow, barony of the North-west Liberties of Londonderry, and city and county of Londonderry, held by the defendant as tenant to the plaintiff

(1) 17 I. L. T. R. 102.
(2) I. R. 9 C. L. 417.
(3) 1 Camp. 466.
(4) 22 W. R. 770.
(5) 8 M. & W. 118.
(6) 19 L. J., Q. B. 295.
(7) 26 L. R. Ir. 640, 651.
(8) [1896] 2 I. R. 273, 286.

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under a lease dated the 5th December, 1892, made by one James Wilson Bradley who was a judicial tenant of the land comprised in the said lease to the defendant. The plaintiff is the administratrix with the will annexed of the said James Wilson Bradley, who died on the 27th August, 1893." The statement of claim then gives the particulars of the said claim, specifying the amounts of three half-yearly gales and one quarter's rent, amounting in all to the sum of of £136 10*s.*, and giving the dates on which the same severally accrued due. The endorsement then proceeds:— "The plaintiff claims in the alternative to recover the sum of £136 10*s.* for the use and occupation by the defendant with the permission of the plaintiff and of the said James Wilson Bradley during his life of the said farm of land from 1st April, 1893, to the 1st January, 1895, at a rent of £78 per annum, particulars as above set forth."

Mr. Drummond and Mr. Gallagher commenced their argument by conceding that the first cause of action set out in the writ could not be sustained. They admitted that the lease was invalid for every purpose; but though they confessed that the lease must be given up, yet they contended that the plaintiff could maintain his claim upon the alternative cause of action set out in the writ. They argued that it was perfectly competent for the plaintiff to recognise that his act was illegal, his lease opposed to the policy of the statute, and yet to demand under the claim in use and occupation the precise sum specified as the rent accruing under the void lease. They contended that though it was illegal for the plaintiff to sublet the land, it was competent for him to permit a person to enter upon and to use the land, and that he is now entitled to recover compensation from the defendant for having so used the land.

We have to recognise that the policy of the subletting code, as interpreted by the chain of authorities to which I have referred, makes any attempt at subletting contrary to the provisions of the code absolutely null and void. But how can we treat the subletting made by the plaintiff to the defendant as absolutely null and void if we give to the person who has contravened the policy of the Act the benefit of the transaction, not indeed under the name of "rent," but under the guise of "compensation" for use

and occupation? In my opinion it is impossible, without violating the principle of the authorities, to give to the plaintiff under his alternative claim what he admittedly cannot recover under his void lease. I am therefore of opinion that the decision of the Queen's Bench Division is right, and should be affirmed.

FITZ GIBBON, L. J.:-

I hold that the question raised by this appeal is not open for us to consider, but is ruled by the necessary and logical result of authorities which bind us. In reality and effect the question is whether the rent reserved by a lease, which is void because it is illegal, can be recovered by calling it compensation, and suing for it in "use and occupation." The action was brought, the pleadings were drawn, and the case has been stated, upon the assumption that the sum claimed, and the only sum recoverable, is the amount of the rent reserved by the lease, a liquidated demand. We have no means of assessing, and the Judge who stated the case has not thought of assessing, or been asked to assess, the value of the defendant's use and occupation of the plaintiff's land, on a *quantum meruit*, or as unliquidated damages. We are confined to the question whether the reserved rent, or a liquidated debt equal to that rent, is recoverable in *assumpsit*.

We cannot now reopen the question whether the views which Fitz Gerald, B., and Christian, L. J., presented in cogent and forcible language, ought to prevail. We are bound to hold the lease absolutely null and void on the ground of illegality, and, that being so, how can we give it the effect of creating, or founding, an alternative liability to pay the rent which it purports to reserve as a liquidated debt? Let us try to state the terms on which the plaintiff asks us to hold that the lands were occupied, so as to formulate the cause of action on which he relies. An illegal and void demise reserving a rent, with a collateral permission by the lessor to occupy the lands on the terms that, at the option of either party, the lessee shall, in spite of the illegality, nevertheless undertake and be bound to pay the reserved rent, by way of compensation for the use and occupation of the lands illegally demised. So stated, the collateral *assumpsit* is either inconsistent with the express contract, or is a mere evasion of its illegality.

Appeal. 1896. O'KANE v. BURNS. Fitz Gibbon, L.J.

An argument has been pressed upon us which does not appear to have been previously used, namely, that the repeal of the second Subletting Act, 7 Wm. 4, c. 29, by the Statute Law Revision Act, 1874, has got rid of the illegality. The Revision Acts never purport to repeal operative statutes: *prima facie* they deal only with statutes which are spent, superseded, or no longer necessary, and it appears to me that 7 Wm. 4, c. 29, was repealed as having been superseded by the Act of 1860, just as it had itself previously superseded the first Subletting Act of Geo. 4. But, however that may be, *Donoughmore* v. *Forrest* (1), and the cases which followed it, were decided upon the Act of 1860, which does not contain any express provision similar to section 4 of 7 Wm. 4, c. 29. Yet, even to the extent of what Christian, L. J., called a *reductio ad latrocinium*, those decisions went to the full length of holding that the Act of 1860 as completely nullified sublettings contrary to its provisions as the previous Acts of Geo. 4 and Wm. 4 had done. In *Fogarty* v. *Shanahan* (2), we were obliged to hold that as the Act of 1860 had been decided, by authorities binding upon us, to have the same drastic effect which had been previously attributed to the earlier Acts, no less force could be given to the similar language of the Act of 1881.

The whole code prohibiting assignment and subletting is supposed to rest on public policy. A decision in favour of the plaintiff here would nullify the code, or at least allow it to be easily and completely evaded. What effect would be left to it, if we were to hold that the party to an illegal agreement to pay rent was legally liable to pay the same rent under another name?

The question really comes back to what was settled long ago—namely, whether the landlord must step in to assert his rights, before an agreement to assign or sublet contrary to the statutes can be treated as void, as between the parties to it? I do not overlook all that is to be said on that question, but we cannot go into it without setting at naught a long series of Irish authorities, which the House of Lords alone can review.

(1) I R. 5 C. L. 443. (2) [1896] 2 I. R. 273, 286.

WALKER, L. J.:—

I concur. Having regard to the frame of the question reserved for us in what may be called a case stated, the only matter we have to consider is whether a liquidated sum can be recovered as rent in this action. There is no question reserved as to whether the plaintiff is entitled to recover a reasonable sum for the use and occupation of the premises.

The point is ruled by a series of decisions binding on us, and which have been in existence for many years. The defendant entered upon the lands under a lease ascertaining a rent and creating a tenancy. It is not disputed that the lease is void, and that the rent cannot be recovered under the lease. But the argument is that though the subletting by the lease is void and illegal, the subtenant may be held to occupy by the permission of the immediate tenant, and so be made liable in use and occupation. The answer to this contention is:—(1) we cannot attribute to the parties against their own language and expressed intention—the purpose that this transaction was to fix on the defendant a liability which was to be measured by compensation to be awarded for use and occupation; and (2) if we call the void tenancy use and occupation, and give to the plaintiff under the name of compensation the very same sum which is not recoverable as rent, we shall be doing what the law does not allow to be done, viz. to do indirectly what cannot by law be done directly.

Solicitor for the plaintiff: *Toland.*
Solicitor for the defendant: *C. S. Caldwell.*

G. Y. D.

Q. B. Div. 1897.

Nov. 4.

SHILLINGTON *v.* MONTGOMERY (1).

Rating—Borough rates—"Occupier"—Rent issuing out of premises used for public or charitable purposes—The Towns Improvement (Ireland) Act, 1854 (17 & 18 *Vict. c.* 103), *ss.* 1, 60—*The Valuation Act,* 1854 (17 & 18 *Vict. c.* 8), *s.* 2.

The lessor of premises, let and used for public or charitable purposes, within the limits of a borough governed by Commissioners constituted under the Towns Improvement (Ireland) Act, 1854, is not chargeable under sect. 60 of that Act to borough rates in respect of half the annual rent derived therefrom, though such half rent is included in the General Valuation Lists, pursuant to sect. 2 of the Valuation Act, 1854.

Greene v. *Thornton* (16 L. R. Ir. 381) discussed.

Case Stated, for the opinion of the Queen's Bench Division, pursuant to 27 & 28 Vict. c. 99, s. 35, by the Lord Chief Baron, on the hearing before him, at the Summer Assizes, 1897, for the Co. Armagh, of an appeal from a decree of the County Court Judge.

The civil bill was brought to recover 11*s.* 8*d.* for town rates and sewer rates in respect of one-half of the annual rent received by the defendant out of certain premises in the town of Portadown, which, during the period to which the rate in question referred, were occupied for the public service as a post-office, and were let by the defendant to the Postmaster-General.

The case stated that "the defendant was not the occupier in fact, but was rated under 17 & 18 Vict. c. 8 (the Valuation Act, 1854, section 2), in respect of one-half the rent derived by him out of the premises," the premises themselves being distinguished as exempt in the General Valuation List, as being of a public nature. The plaintiff was the rate collector of the Commissioners of Portadown, who are incorporated under the provisions of the Towns Improvement (Ireland) Act, 1854. The

(1) Before Murphy, Gibson, and Madden, JJ.

question submitted to the Court was whether said rates were payable in respect of said half-rent.

S. L. Brown, for the plaintiff.

A. H. Bates, for the defendant (appellant).

Counsel referred to section 60 of The Towns Improvement (Ireland) Act, 1854, and the definitions of "premises" and "occupier" therein (s. 1), to *O'Connell* v. *Tralee Town Commissioners* (1); *Greene* v. *Thornton* (2); *Reddington* v. *Millar* (3); and *Ennis Town Commissioners* v. *Macbeth* (4).

MURPHY, J.:—

I think that I may state for myself and for the other members of the Court, that the only doubt raised in our minds for a moment is that suggested by the decision in *Greene* v. *Thornton* (2) of the Court of Appeal. But, looking at the decision in that case, we find that it was on an argument upon a demurrer, and that the point here raised was not actually decided; for Fitz Gibbon, L.J. (at page 397 of the report) says—"On this demurrer we must take it that the payments in dispute were duly assessed on the half-rent, and were not primarily recoverable by the taxing authority from the lessees, or out of the demised tenement, but were assessed upon the half rent, and recoverable in the first instance from the lessors." Now, this is the very question that is raised here—the question that, in the case of *Greene* v. *Thornton* (2) the Lord Justice says expressly was to be assumed, and upon which the Court therefore did not enter. Forming the best opinion we can of the case, and having regard to the construction of section 60 of the Act of 1854, it appears to us that none are made liable to these local assessments except "*occupiers* of *premises*" within the town . . . rated in respect of such premises under the Acts for the relief of the poor. The defendant here is clearly not an occupier. It has been suggested that he may be brought in under the definition of occupier in the

(1) 32 L. R. Ir. 198.
(2) 16 L. R. Ir. 381.
(3) 24 L. R. Ir. 65.
(4) *Supra*, p. 552.

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Murphy, J.

1st section. Well, so far as that definition goes, he seems to be clearly not brought within it, for it states that "the word 'occupier' shall extend to and include an immediate lessor made liable under this Act to assessments in cases of premises of such small annual value as hereinafter mentioned respectively in that behalf, and such word 'occupier' shall not include a lodger or a party in the occupation as tenant of a furnished house for a less period than one year, but shall include the party by whom such furnished house is so let." The defendant in the case before us is no doubt an immediate lessor, but not of the classes there mentioned. An immediate lessor is not made chargeable in a case of this kind, and, unless he is caught by some provision of the statute, he cannot be brought within the definition of an "occupier of premises" within the town. For these reasons we consider that the defendant is not liable to be rated under the Act of 1854, and that the amount claimed cannot be therefore recovered against him. If it is thought that this view conflicts with the decision of the Court of Appeal in *Greene* v. *Thornton*, (1) it would be desirable, and it is now possible, to review our order in that Court.

GIBSON and MADDEN, JJ., concurred.

Solicitors for plaintiff: *Carleton & Co.*
Solicitors for defendant: *Atkinson & Son.*

J. H. P.

(1) 16 L. R. Ir. 381, 399.

TOOMEY *v.* MURPHY (1).

(1897. No. 5678.)

Q. B. Div.
1897.
Nov. 12.

Practice—R. S. C. I., Order III., R. 6—Judgment in default of appearance —Liquidated demand.

When by a building agreement the defendant agreed with the plaintiff to execute certain works according to plans and specifications by a certain date to the satisfaction of the plaintiff's engineer, and that if not then completed the defendant should be liable to "a penalty as liquidated damages" of £5 a week until completion.

In an action for £160, claiming £5 a-week for thirty-two weeks delay in completion of the work:—

Held, a liquidated demand within Order III., R. 6, for which in default of appearance the plaintiff was entitled to judgment under Order XIII., Rule 3.

MOTION on behalf of the plaintiff, for a direction to the proper officer to enter final judgment.

The action was brought by the plaintiff, on a specially indorsed writ; and the statement of claim indorsed was as follows:—

The plaintiff's claim is £160 for debt, by agreement dated the 16th of June, 1896, whereby the defendant agreed to do certain works and alterations in the plaintiff's dwellinghouse and premises at ——— for the sum of £132 10*s.*, and further agreed to commence said works and alterations on or before Monday, the 21st July, 1896, and to complete said works and alterations before the 1st of October, 1896, all said works and alterations to be done according to the plans and specifications of A. Barnard, C. E., and subject to his approval; but though the plaintiff paid defendant according to said specification the defendant did not complete said works and alterations before the 1st October, 1896, nor since, whereby he incurred by said agreement a penalty of £5 per week, to be recovered as liquidated damages, and there is now due on foot of said agreement for the breaches thereof £160, being £5 per week for thirty-two weeks up to the 1st day of June, inst.

(1) Before MURPHY and MADDEN, JJ.

Q. B. Div. 1897.

TOOMEY v. MURPHY.

The defendant did not enter an appearance to said writ, and thereupon the plaintiff applied to the proper officer to enter final judgment by reason of such default. The officer refused to enter final judgment, on the ground that the plaintiff's claim was for a penalty and not for a liquidated demand, and refused to enter interlocutory judgment, on the ground that it was a proper case for taking an account. The affidavit of debt produced to the officer deposed that a substantial portion of the work agreed on was left unfinished by the defendant, and made an exhibit of the original agreement mentioned in the statement of claim, the portion of which providing for the payment by the defendant of the penalty sued for was as follows: (after providing for the commencement of the work, proceeded thus)—that the defendant "will complete same according to said specification, as aforesaid, before the 1st day of October next, and that for every week beyond that date until completion of said works he shall be liable to a penalty as liquidated damages of £5 per week, and that he, the said C. Murphy, will, within twenty-one days from the day on which he will commence to remove the present roof of the dwelling-house, completely finish the new roof, as specified as aforesaid in the specification, under a penalty as liquidated damages of £3 a-day for every day in excess of that time, unless caused by unavoidable accident." After such refusal by the officer as aforesaid, the plaintiff applied to the Divisional Court for an order directing the officer to enter final judgment in default of appearance.

W. Jeffrey White, for the plaintiff:—

The plaintiff is entitled to final judgment in default of appearance. The plaintiff's claim is in the nature of a liquidated demand within the meaning of Gen. Ord. III., R. 6. Although the statement of claim specifies the amount payable by the defendant as a "penalty," and although it is similarly described in the agreement, it is really not a "penalty," but in the nature of liquidated damages: *Elphinstone* v. *Monkland Iron and Coal Company* (1); *Law* v. *Local Board of Redditch* (2); *Dodd* v. *Churton* (3); and *Wright* v. *Tracey* (4).

(1) 11 App. Cas. 332.
(2) [1892] 1 Q. B. 127.
(3) [1897] 1 Q. B. 562.
(4) I. R. 7 C. L. 134.

THE COURT granted the motion.

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The following is the curial part of the order:—

"ON hearing the said indorsement read, the Court being of opinion that the said writ is indorsed for a liquidated demand, it is ordered that the proper officer be at liberty to mark judgment thereon for the sum claimed upon production of the necessary documents."

Judgment was accordingly entered.

Solicitor for the plaintiff: *T. R. Herley.*

J. P. B.

REG. (GIBSON AND OTHERS) *v.* JUSTICES OF COUNTY FERMANAGH (1).

Q. B. Div. 1897. Nov. 5.

Summary jurisdiction—Appeal—Recognisance—Several complainants joined in one summons—Petty Sessions (Ireland) Act, 1851 (14 & 15 *Vict. c.* 93), *s.* 24—*County Courts and Officers (Ireland) Act*, 1877 (40 & 41 *Vict. c.* 56), *s.* 74.

Where, in a prosecution before Justices at Petty Sessions under the Fishery Laws, four persons were joined as complainants, and (the complaint having been dismissed) only one of the four entered, in appealing, into the statutory recognisances:—

Held, that he was entitled to prosecute the appeal.

CERTIORARI. The applicants were prosecuted before the Justices at Beleek Petty Sessions for trespass to a several fishery (Lough Erne), contrary to section 41 of the Salmon Fisheries (Ireland) Act, 1848 (11 & 12 Vict. c. 92). There were three summons in all. The prosecution in each case was upon the complaint of four persons, who were, as matter of fact, lessees of the fishery. The Justices, by a majority, dismissed the case without prejudice. Notice of intention to appeal, signed by all four prosecutors *per* their solicitor, was duly given in each case. Only one of the prosecutors (the others being absent in England) entered into the statutory

(1) Before PALLES, C.B., and O'BRIEN and JOHNSON, JJ.

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recognisances (Form "C" in the Schedule to the Petty Sessions (Ir.) Act, 1851), binding "himself" to appear, &c., at Quarter Sessions. At Quarter Sessions, His Honour Judge Craig, overruling the objection then made, that the recognisances, being only by one of four appellants, were insufficient, heard the appeals (1), and inflicted fines in each case on the defendants, who applied for and obtained a conditional order for a writ of *certiorari* to remove the orders of the Court of Quarter Sessions, on the grounds (*a*) that the appeal was not properly before the Quarter Sessions Court by reason of non-compliance with the statutory requirements as to recognisances, and (*b*) that a *bona fide* question of title was involved.

Ronan, Q.C. (*Herbert Wilson* with him), for the applicants, now moved to have the conditional order made absolute. As to the first point, the complaint and appeal being by the four lessees of the fishery jointly, they should all have entered into recognisances to prosecute the appeal, and abide the costs thereof. The defendant was entitled to the benefit of security for costs from all four. It might, perhaps, be otherwise had one only served notice of intention to appeal, but the notice was signed by all the complainants, stating "it is *our* intention to prosecute *our* appeal." The appeal is under section 74 of the County Courts Act, 1877, (2)

(1) See 31 Ir. L. T. R., 2nd Oct.

(2) The County Courts Act, 1877 (40 & 41 Vict. c. 56, s. 74), provides that in case of a dismissal by Justices of any complaint under the Salmon Fisheries Acts, either on the merits or without prejudice, "if any person prosecuting shall feel aggrieved by such order of dismissal, such person may appeal against such order; and the several provisions of s. 24 of the Petty Sessions (Ireland) Act, 1851, as amended by this Act, shall extend and may be applied to such appeal: provided that the amount of the recognisance to be entered into by such appellant shall be such as to the Justices shall seem reasonable."

The Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), section 24, provides that "either party (whether he shall be the complainant or defendant) in cases of a civil nature, or the party against whom the order shall have been made in other cases, shall be entitled to appeal . . . subject to the following provisions":—(1) He shall serve notice in writing of his intention to appeal . . . (2) He shall also within three days after such notice as aforesaid enter into a recognisance according to the form "C" . . .

and section 24 of the Petty Sessions Act. The word "appellant," in the singular, must (see the Interpretation Act, 1889), be read as including the plural. The second proviso of section 24, therefore, in this case, is that they, the appellants, shall enter into a recognisance. [PALLES, C.B.: The prosecution was by the four complainants as common informers; in a case of this sort could not one of them have appealed without the others?] But the appeal was taken jointly; if it had been taken by one only the question would have been a different one altogether. The Quarter Sessions Court has authority to perfect or amend invalid recognisances (27 & 28 Vict. c. 99, s. 50), but the appellants refused to avail themselves of this power. [Counsel referred also to 1 Burns' Justice, and to *Re Dillon* (1).]

The Right Hon. C. H. Hemphill, Q.C. (*C. W. R. Brady* with him), for the respondents:—

The prosecutors could not proceed as joint lessees of the fishery; their position was that of common informers merely, prosecuting severally, but joined in the one complaint. Section 74 gives the right of appeal to "any person prosecuting . . . (who) shall feel aggrieved." Therefore, even should the appeal, so far as regards the other three, fall through, still it is good as regards the appellant by whom the recognisance was entered into. [Counsel also referred to *Reg.* v. *Mozley* (2), and to the Rules of the Judges (16th June, 1843) in Johnson's Copinger.]

The COURT held that the party who had entered into the recognisance was entitled to prosecute the appeal; and, having heard counsel on the second point alleged as a ground for *certiorari*, discharged the conditional order with costs.

Solicitor for the applicants: *J. F. Wray.*
Solicitor for the respondents: *A. Stubbs.*

A. E. R. J.

(1) Crimes Act (1887) Cases, p. 181. (2) 10 W. R. 78.

Q. B. Div. 1897.

Feb. 24.
May 18.

THE QUEEN (BEAUFORT) *v.* JUSTICES OF COUNTY MEATH (1).

Tithe rentcharge—Application to vary—Quarter Sessions—Time—Statute—Goulburn's Act (4 *Geo.* 4, *c.* 99), *s.* 43—*Stanley's Act* (2 *&* 3 *Wm.* 4, *c.* 119), *s.* 6.

Where the Michaelmas Sessions for the county happened to commence on the 2nd November, and on that day an application on the part of certain tithe rentcharge-payers for revision of the tithe rentcharge came on for hearing, such tithe rentcharge-payers having first duly posted, in September, the notices required by the statute (4 Geo. 4, c. 99, s. 43), and having, on the 26th September, served on the Clerk of the Peace, as representing the Court of Quarter Sessions, a notice signed by them of their intention to apply :—

Held, *per Curiam*, that the Justices had jurisdiction to revise the rentcharge, notwithstanding the tithe-owner's objection that the application to vary was not made between the 1st May and 1st November.

Held, *per* O'Brien and Johnson, JJ., that the service, before the 1st November, on the officer of the Court, of notice of the application, was a sufficient compliance with s. 43.

Held, *per* Madden, J., that the only mandatory provision, as to time, in s. 43 of Goulburn's Act, and s. 6 of Stanley's Act (2 & 3 Wm. 4, c. 119) was that the required notices should be posted between the 1st May and 1st November, and that accordingly the application made at Quarter Sessions on the 2nd November was in time.

Certiorari. This was a motion to make absolute a conditional order for a writ to remove and quash an order, dated the 2nd of November, 1896, of the Chairman (his Honour Judge Curran) and Justices of county Meath, varying the tithe rentcharge in the parish of Ardcath. The certificate of tithe composition bore date the 31st of October, 1833. At the June Sessions, 1896, an order had been obtained from the Justices varying the rentcharge, but this had been subsequently quashed by the Court, on the ground that the statutory notices had not been posted as prescribed. [See the case reported, *Reg.* (*Saurin*) v. *Justices of*

(1) Before O'Brien, Johnson, and Madden, JJ.

Meath (1).] The respondent tithe-payers accordingly instituted a new application to the Michaelmas Quarter Sessions for the county. These Sessions opened at Kells on the 2nd of November, 1896 (a Monday), and at Trim on the 5th of the same month. It appeared that the requisite notices had been duly posted in September, and that a formal notice in writing of the intended application had been served, on the 26th of September, on the Clerk of the Peace for the county. On the 2nd of November, when the matter came on for hearing at Kells, it was objected on behalf of the lay impropriators, that the application was too late, not being made between the 1st of May and the 1st of November. His Honour, however, overruled this contention, stating, amongst other grounds for so doing, that he was bound under the Civil Bill Acts to conclude the Quarter Sessions for the county in the month of October, but, for reasons of convenience, he had not commenced them sufficiently early to allow of this, and accordingly could not allow the applicants to be deprived of their rights through this omission. The hearing then proceeded, and an order was made reducing the rentcharge.

The lay impropriators now sought to have this order removed and quashed on the ground "that the application for variation was not made between the 1st of May and the 1st of November in a seventh year after the day from which the composition fixed by the certificate, dated the 31st of October, 1833, commenced."

J. H. Campbell, Q.C. (*Arthur Meredith* with him), for the prosecutors.

M. J. Bourke, Q.C., and *D. G. Chaytor*, for the respondents.

[Counsel referred to 4 Geo. 4, c. 99, sect. 43; 5 Geo. 4, c. 63, sect. 23; 2 & 3 Wm. 4, c. 119, sect. 6; also to *Reg.* v. *Justices of Co. Cork* (2); *Reg.* (*Norcott*) v. *Justices of County Cork* (3); *Reg.* (*Longfield*) v. *Justices of County Cork* (4); *Reg.* (*Creed*) v. *Justices of County Tipperary* (5); *Re Pilltown Presentments* (6); *Barker* v.

(1) [1897] 2 Ir. R. 21.
(2) 7 Ir. C. L. R. 249.
(3) 28 L. R. Ir. 185.
(4) *Ibid.* 369.
(5) [1897] 2 Ir. R. 486.
(6) 23 Ir. L. T. R. 16.

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May 18.

Palmer (1); *Edwards* v. *Roberts* (2); Maxwell on Statutes (2nd Ed.), p. 459.]

Cur. adv. vult.

O'BRIEN, J.:—

In this case it has been contended that the application to vary tithe rentcharge must be made between the 1st of May and the 1st of November in the proper year, and that as the Michaelmas Sessions for County Meath in 1896 commenced on the 2nd of November, it is impossible for the tithe payers to reduce the burden under which they lie until another septennial period has elapsed. It has been argued that this provision is mandatory, and that to allow the application—that is, according to the view put forward by the prosecutors, the hearing at Quarter Sessions—to be made after the 1st of November, would result in having as a basis for the calculations of the average prices in such a case a seven years' period overlapping and running into the period from which the revised rentcharge was to run. I do not think that any weight can be attached to this argument. In the present instance the 1st of November was a Sunday, and thus the hearing was actually had but one day later than the statute permitted, and the ascertained amount of variation could not possibly have been based on the prices of any period extending into the seven years for which the new charge was to run. If it were necessary to consider the matter it might be a question of some difficulty to determine whether such a case as this would come within the rule *Actus curiæ nulli facit injuriam*, seeing that it appears on the affidavit filed as cause that the Sessions were held and the order made on the 2nd of November for the reason that Judge Curran had found it convenient—which I take it must be owing to indisposition—to sit outside the month of October, the Sessions being, as a matter of fact, held, as I have mentioned, but one day too late. I should, perhaps, be disposed to take that view, but it is, in my opinion, unnecessary for the purposes of the case before the Court. The Acts of Parliament containing the provisions relative to variation—originally in every third year and afterwards septennially—do not, somewhat curiously, lay down definitely and

(1) 8 Q. B. D. 9. (2) [1891] 1 Q. B. 302.

distinctly any time within which the *order* must be made; it directs that the *application* shall be made between the 1st of May and the 1st of November, but does not say that the *order* must be made within that period, and it does not appear from the statute whether the two are the same thing. There is indeed another point of time clearly laid down in the Act which by inference might be construed to mean that the order must be made before the 1st of November, namely, the provision that the revised rentcharge shall commence from the 1st of November. This can, however, present no insuperable difficulty for the reason that even if the Act of Parliament is strictly complied with and the order made before the end of October, there still will be a period which it does not cover; the old rentcharge still continues until the 31st of October.

It appears from the affidavits that all the preliminaries have been complied with, although so technical; the notices were duly signed and posted, and no question arises for decision as to the validity of the order save upon the point taken that the Sessions were held and the order made on the 2nd November. But in those affidavits the important point is stated that formal notice of the application was transmitted in the month of September to the Clerk of the Peace. In some instances something in the nature of a petition is lodged, but I believe the more usual practice is that a copy of the posted notices is sent to the Clerk, just as is done in applications under the Grand Jury Act. Here a copy or duplicate of the posted notice was sent to the Clerk of the Peace, whose duty it was to retain it and to bring it before the Court in the ordinary way. These applications or notices of intention to apply are I believe entered in the list of the business of the Sessions, and are produced for the information of the Justices when the cases are called on in their order. It was not necessary for counsel to rise in Court and formally say, "I apply, &c." It was the duty of the Clerk of the Peace to keep the notice and bring it before the Quarter Sessions at the proper time; and, having regard to the nature of these statutes and the important public object they had in view, providing for periodic re-adjustment of this burthen, it appears to me that it would be highly technical even if not absolutely unreasonable to deprive the applicants of their rights upon

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the ground now relied on. I am clearly of opinion that the notice transmitted to the Clerk was an application within the statute, that thus the application was in time, and the order of the Quarter Sessions good accordingly.

MADDEN, J.:—

The automatic re-adjustment of tithe rentcharge, at stated intervals, in accordance with the variation in price of a certain kind of agricultural produce, ascertained from notices in the *Dublin Gazette*, is, in its essential elements, the simplest operation which it is possible to conceive in the whole range of real property law. And yet but few orders have stood the test of criticism in this Court, so complicated is the legal machinery which has been devised for the attainment of this result, and so precise are the requirements of the statutes. In the case of the tithe rentcharge now before us we were reluctantly obliged to hold that a notice was insufficiently posted, inasmuch as it was not affixed to a door, although it was posted in the usual place for exhibiting notices of the kind (1). So long as the legal machinery is allowed to remain so cumbrous and ineffective, these breakdowns are inevitable.

I am glad to come to the conclusion that the order now before us need not be added to the number of unsuccessful attempts to work out a very simple problem. I cannot adopt the view presented to us in support of the order, according to which the date of the application to the Justices of the Peace at Quarter Sessions is to be taken as the 26th September, the day on which a written notice of application was lodged with the Clerk of the Peace. There were at that date no Justices assembled at Quarter Sessions to whom an application could be made. The order before us treats the actual hearing at Quarter Sessions as the statutory application to the Justices, following in this particular every order which has come before me up to the present. I can find no suggestion to the contrary in any reported case. There are, no doubt, cases in which the service of notice of application to a Court has been treated, for the purpose of calculating time, as an application

(1) [1897] 2 Ir. R. 21.

to the Court. But the application to the Justices under the 43rd section is to be made at Quarter Sessions. It is the same application of which notice is to be posted in the statutory manner. There were on the 26th September no Justices assembled at Quarter Sessions to whom an application could be made; and I do not think that the requirements of the statute are satisfied by lodging with the Clerk of the Peace a copy of the written application subsequently presented to the Justices.

I do not, however, consider it necessary to discuss this matter in detail, inasmuch as I am of opinion that the application to the Justices on the 2nd November was made in time, and that the order under consideration is good. The 43rd section of Goulburn's Act contains certain provisions which are undoubtedly mandatory. The statutory notice must be posted between the 1st May and the 1st October in the last year of the statutory term, "but in no other or intermediate year," the last Sunday on which it is posted "not being less than eight days previous to the day of holding the then ensuing Quarter Session." These are negative words, and, if the conditions to which they are attached are not complied with, the order is bad. But it seems to me that the applicant who has complied with those conditions acquires a right to have his application heard by the Justices at the next ensuing Quarter Sessions. "It shall be lawful for the person or parties by or on whose behalf such notice shall have been so given, to make such application to such Justices at such Quarter Sessions, in writing, for such purpose accordingly: and thereupon it shall be lawful for such Justices, and they are hereby required at such sessions, or any adjournment thereof," to take the various steps specified in the section. I can find no limitation of time with regard to the action of the Justices, save only that the variation must be effected at the sessions next ensuing the posting of the notice, or at some adjournment thereof,

It has, however, been contended on behalf of the tithe-owner, that although the 43rd section, and the amending section (5 Geo. 4, c. 63 s. 23), are silent on this point, a time limit is imported into the proceedings by virtue of the 6th section of Stanley's Act. The primary object of this enactment was totally different. Goulburn's Act had established in Ireland a statutory composition in

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lieu of tithes, which had previously been payable in kind. This composition, however, was a temporary one, and after the lapse of twenty-one years, the peculiar estate known as tithes was to revive with all its former incidents. Stanley's Act was passed for the purpose of establishing a fixed and permanent composition in lieu of tithes, "with a view to the future commutation thereof"; a policy which was finally consummated by the Tithe Rentcharge Act (1838). The 6th section of Stanley's Act applies, to the permanent composition in lieu of tithes, the existing statutory procedure as to variation. The variation is to be effected "at any time between the 1st of May and the 1st of November in each succeeding seventh year," and the composition is to "be increased or diminished with reference to the average price of corn as advertised in the *Dublin Gazette* during the seven years immediately preceding, and not otherwise."

If, indeed, the variation could only be effected between the 1st of May and the 1st of November, by the actual making of an order between those dates, the order before us would be manifestly bad, inasmuch as it was not made until the 2nd of November. That there is much to be said in support of this construction of the statute is evident from the fact that it commended itself to the minds of Lefroy, C.J., and Perrin, J., as appears from their judgment in the case of *Reg.* (*Gollock*) v. *Justices of Cork* (1). Moore, and Crampton, JJ., however, took a different view, and their opinion has been sanctioned and adopted by the Court of Appeal: *Reg.* (*Norcott*) v. *Justices of Cork* (2). No doubt, in that case, the application had been made to the Justices before the 1st of November, and adjourned to a subsequent date. But even so, the decision must have been otherwise if the provisions of the 43rd section of Goulburn's Act, and the 6th section of Stanley's Act, read together, had been held to be mandatory in respect of time, in accordance with the opinion of Lefroy, C.J., and Perrin, J., in the case to which I have referred.

Once this position is abandoned, and it is now untenable, it follows that the only mandatory provisions as to time are those with regard to the service of the notices between the 1st May and

(1) 7 I. C. L. R. 249. (2) 28 L. R. Ir. 185.

the 1st October. The applicant who complies with the requirements of the statute acquires a right to make his application at the next sessions, and to have it heard at those sessions, or any adjournment thereof, and this right cannot be defeated by any act or default of the magistrates, for which he is not responsible. This conclusion appears to me to follow from the judgment of the Lord Chief Baron in *Reg.* (*Norcott*) v. *Justices of Cork* (1), and to be in entire accord with the opinion expressed by all the members of the Court of Appeal in that case. I see no inconsistency between this view of the statute, and the provision that the new charge is to commence from the 1st of November. At all events this difficulty was overcome by the Court of Appeal in the case to which I have referred. I, therefore, concur in the judgment of the Court.

O'BRIEN, J.:—

Mr. Justice Johnson, who is engaged in the Admiralty, has authorized me to say that he agrees in the decision of the Court, for the reasons expressed in my judgment.

The conditional order will be discharged with costs.

Solicitors for the prosecutors: *Hardman & Sons.*

Solicitors for the respondents: *Montgomery & Chaytor.*

A. E. R. J.

(1) 28 L. R. Ir. 185

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Nov. 11, 15, 16, 22.

BAILIE *v.* T. S. IRWIN AND REV. A. S. IRWIN (1).

(1895. No. 4234.)

Statutes of Limitation—Action upon covenant in mortgage deed—Payment of interest by one of several mortgagors—3 & 4 Wm. 4, c. 27, s. 40—3 & 4 Wm. 4, c. 42, s. 3—16 & 17 Vict. c. 113, s. 20—37 & 38 Vict. c. 57, s. 8—19 & 20 Vict. c. 97, s. 14.

In a mortgage deed of land, dated in 1853, A and B, the mortgagors, jointly and severally covenanted with C, the mortgagee, for payment of principal and interest. Interest was paid by A to the time of action brought. Neither principal nor interest was paid by B. In an action on the covenant against A and B :—

Held, that the payments by A prevented the Statute of Limitations from running in favour of B.

The Mercantile Law Amendment Act (19 & 20 Vict. c. 97), s. 14, does not apply to a personal action brought to recover money secured by a mortgage of land.

MOTION on behalf of the defendant, the Rev. Alexander Staples Irwin, that the judgment entered for the plaintiff at the trial be set aside and judgment entered for the said defendant, or for a new trial, on the ground that upon the findings of the learned Judge at the trial the judgment in the action was wrongly directed to be entered for the plaintiff.

The action was brought to recover £2198 principal and interest due on foot of two indentures of mortgage. The statement of claim endorsed on the writ of summons was as follows :—

The plaintiff's claim is for £2198 being for two sums of £700, and £700 each due for principal and £798 being nine and a-half years' interest on the said two sums of £700 each to the 1st February, 1895, at the rate of £6 per cent. per annum and due on an indenture of mortgage (2), and a covenant and agreement express and implied in said indenture of mortgage dated the 8th September,

(1) Before MURPHY, MADDEN, and BOYD, JJ.

(2) The mortgaged premises were certain lands in the county of Tyrone, held for years renewable for ever.

1853, and made between Benjamin Dickson of the first part, J. M. Irwin of the second part, J. D. Johnston of the third part, the defendants Thomas Staples Irwin and Rev. Alexander Staples Irwin, and J. E. Irwin of the fourth part, the Rev. T. S. Monck, Eliza Richardson, and the plaintiff and W. Graves, and Courtenay Newton of the fifth part, and the Rev. T. S. Monck, and Courtenay Newton of the sixth part, and whereby the said J. M. Irwin, J. D. Johnston, and the defendants and J. E. Irwin, did for themselves jointly and severally and for their respective heirs, executors and administrators, covenant with the said T. S. Monck, Eliza Richardson, and the plaintiff, and W. Graves, and Courtenay Newton, respectively, and their respective executors, administrators, and assigns, that they the said J. M. Irwin, J. D. Johnston, T. S. Irwin, A. S. Irwin, and J. E. Irwin, their heirs, executors, or administrators, or some or one of them, would well and truly pay or cause to be paid on the 19th February, 1854, the sum of £6084 5*s.* 8*d.*, together with interest at the rate of £6 per cent. per annum, to the said T. S. Monck, Eliza Richardson, and the plaintiff and W. Graves and Courtenay Newton, their respective executors, administrators or assigns, in the shares and proportions in which they had respectively advanced and contributed to the said sum of £6084 5*s.* 8*d.* as thereinbefore set forth, without any deduction or abatement whatsoever; and by said indenture the defendants and the said other parties jointly and severally agreed and covenanted expressly and impliedly, that if the said sum of £6084 5*s.* 8*d.* or any part thereof, should not be repaid on the said 19th February, 1854, they would pay interest at the rate of £6 per cent. per annum on the said sum or so much thereof as should remain unpaid until paid to the plaintiff and the said other parties in the proportions in which they had each advanced the same; and by the said indenture it was declared that the plaintiff and the said Eliza Richardson had and they did advance £700 each of them the said sum of £6084 5*s.* 8*d.*; and afterwards the said Eliza Richardson died, and by indenture dated the 1st February, 1872, her executor assigned the said £700 that she had so advanced and all interest due and to accrue due thereon to the plaintiff, and the plaintiff has since been paid interest thereon. And for money lent

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by the plaintiff to the defendants at their request and interest thereon. (Then followed the particulars.)

The defendant Thomas Staples Irwin allowed judgment to go by default; but the second defendant, the Rev. Alexander Staples Irwin, entered an appearance and delivered a statement of defence in which besides traversing all material averments in the statement of claim pleaded (paragraph 4), the statute 3 & 4 Wm. 4, c. 42; and (5) the statutes 3 & 4 Wm. 4, c. 27, and 37 & 38 Vict. c. 57; and (8) as to the claim for money lent, pleaded the 16 & 17 Vict. c. 113. The plaintiff joined issue.

The action was tried in the Trinity Sittings, 1897, before Mr. Justice Holmes without a jury.

The only question material to this report arose upon the pleas of the Statutes of Limitation. Counsel for the defendant admitted that the agent of T. S. Irwin, who at the time was owner of the mortgaged lands, paid the interest due to the plaintiff up to the 31st December, 1887, the subsequent interest up to the 19th August, 1895, being paid out of the proceeds of sale in the Land Judge's Court. The learned Judge in his report, stated that he decided the action on the authority of *Allison* v. *Frisby* (1), and gave judgment in the following words:— "The only defence to the portion of the claim which relates to the £700 alleged to be due to the plaintiff under the covenant entered into with herself is the Statute of Limitations. Which is the statute upon which the defendant relies? I presume Mr. Wylie, Q.C. (counsel for the defendant), would answer, the Common Law Procedure Amendment (Ireland) Act, 1853, s. 20, taken in connection with the Mercantile Law Amendment Act, 1856, s. 14. If he is right in this he may proceed to argue that payment of interest by a co-debtor would not deprive him of the benefit of the provision as to the time within which the action must be brought, and it would then become my duty to consider the counter arguments and authorities brought forward by Mr. Matheson (counsel for the plaintiff). But, is he right? I am clearly of opinion he is not. It is now well settled that it is the Real Property Limitation Act, 1874, s. 8, that fixes the period of limitation in cases of actions against a mortgagor on a covenant

(1) 43 Ch. D. 106.

for payment for the mortgage debt. The case of *Allison* v. *Frisby* (1) leaves it in doubt whether this section applies to a person who joins as surety only to pay a mortgage debt. Mr. Wylie's client is not a surety. He is one of the mortgagors, and nothing else. This being so, *Allison* v. *Frisby* (1) is decisive that payment of interest by a co-debtor within the period deprives him of the benefit of the provision as to limitation. The plaintiff is therefore entitled to judgment for £457 15*s.* 11*d.* and interest thereon since the 9th November last, being the amount now due under the covenant to herself. As to the rest of the claim the defendant has pleaded that no notice of the assignment of the liability was given to him, and this is admitted to be true. The plaintiff is therefore not entitled to judgment for the unpaid balance of the second sum of £700; but it can probably be recovered in other proceedings." His Lordship thereupon gave judgment for £474 17*s.* 5*d.* (2).

Wylie, *Q.C.*, and *Henry*, *Q.C.*, for the defendant Alexander Staples Irwin (3):—

The payments of interest by Thomas Staples Irwin do not affect our client: 19 & 20 Vict. c. 97 (the Mercantile Law Amendment Act, 1856), s. 14. The real question here is, What is the Statute of Limitations governing the present case? We say, having regard to the date of the mortgage deed, the operative statutory enactment is the 16 & 17 Vict. c. 113 (Common Law Procedure Amendment Act, Ireland, 1853), s. 20, corresponding to the English statute 3 & 4 Wm. 4, c. 42, upon which there have been numerous decisions. If we are right in this contention—in treating this as an action for a specialty debt—the operation of the 14th section of the Mercantile Law Amendment Act is necessarily attracted, and the plaintiff's remedy was barred even prior

(1) 43 Ch. D. 106.

(2) This was the amount which would be admittedly due on the first-mentioned sum of £700 after credits which were not disputed.

(3) After the arguments had been partially opened, the Court called attention to the fact that the claim, if barred, was extinguished prior to the Real Property Limitation Act of 1874, and invited counsel to apply themselves to the effect of the earlier statutes.

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to the 37 & 38 Vict. c. 57, as Alexander Staples Irwin admittedly never made any payment at all.

Previously to 1874 there were three statutes applicable to mortgages which it is necessary to consider, viz. 3 & 4 Wm. 4, c. 27, ss. 2, 40, 42; 3 & 4 Wm. 4, c. 42, s. 3; 7 Wm. 4 and 1 Vict. c. 28. Section 2 of 3 & 4 Wm. 4, c. 27, and 7 Wm. 4 and 1 Vict. c. 28, dealt with the mortgagee's right to recover the mortgaged land. Sections 40 and 42 of the 3 & 4 Wm. 4, c. 27, dealt with his right to recover the principal of his debt and arrears of interest as against the land; and 3 & 4 Wm. 4, c. 42. s. 3, dealt with his right to recover principal and arrears of interest in a personal action on the covenant. The distinction between an action to enforce the personal remedies, and an action affecting the mortgaged land has been settled in many cases of the highest authority: *Hunter* v. *Nockolds* (1); *Hughes* v. *Kelly* (2); *Elvery* v. *Norwood* (3). Though only six years' arrears of interest were recoverable against the land, twenty years' arrears were held to be recoverable on the covenant. [They cited and referred to *Dickinson* v. *Teasdale* (4); *Coope* v. *Cresswell* (5); *Wolmershausen* v. *Wolmershausen* (6).] In *In re Frisby; Allison* v. *Frisby* (7) and the other cases which will be relied on by the plaintiff section 8 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), was held to be the governing enactment, and they are not authorities in a case like the present where twenty years expired before the Act of 1874 came into operation. The defendant in those cases relied on sect. 8, and was therefore affected by a payment within the Act.

Matheson, Q.C., and *Wakely*, for the plaintiff:—

The statute applicable is either the Real Property Limitation Act, 1874, sect. 8, or, if the dates bring the case within earlier legislation, the 3 & 4 Wm. 4, c. 27, sect. 40; both sections are the same in terms, except the period of limitation, which is here immaterial. This is an action to recover a sum of money "secured by mortgage" "charged upon land." It does not matter whether

(1) 1 Mac N. & Gord. 640.
(2) 3 Dr. & War. 482.
(3) 5 De G. & Sm. 240.
(4) 1 De G. J. & S. 52.
(5) L. R. 2 Ch. App. 112.
(6) 62 L. T. (N. S.) 541.
(7) 43 Ch. D. 106.

the action is at law or in equity, whether it is a proceeding to recover the land or to sell the land, or to compel the mortgagor to pay.

The recent authorities place the question beyond the pale of argument: *In re Frisby*; *Allison* v. *Frisby* (1); *In re Powers*; *Lindsell* v. *Phillips* (2); *Sutton* v. *Sutton* (3); *Fearnside* v. *Flint* (4); *In re Nugent's Trusts* (5). If this be so, the Mercantile Law Amendment Act, sect. 14, must admittedly be out of the case. [*In re England*; *Steward* v. *England* (6); *Leahy* v. *De Moleyns* (7); *Evans* v. *O'Donnell* (8); *Doe* v. *Williams* (9); *Chinnery* v. *Evans* (10); and Darby and Bosanquet on the Statutes of Limitations, pages 167, 168, 169, were also referred to.]

Cur. adv. vult.

Nov. 22.

MADDEN, J.:—

This case raises an important question upon the Statutes of Limitation, which, in the form presented to us, has never been the subject of judicial decision. The action is brought upon a joint and several covenant, contained in an indenture of mortgage, against one of two mortgagors. The mortgage was executed by the defendants Thomas Staples Irwin and Alexander Staples Irwin in 1853, and the mortgage debt became payable, under the covenant, in the year 1854, before the Real Property Limitation Act, 1874, came into operation. Interest has been paid by Thomas Staples Irwin, or out of the mortgaged land, up to 1895. No question arises as to his liability under the covenant, and he has allowed judgment to go by default. No interest was ever paid by the defendant Alexander Staples Irwin, and he relies, as a defence to the action, upon the 20th section of the Common Law Procedure Amendment Act, 1853, which, he contends, is the section applicable in Ireland to every action upon a covenant, whether contained in a mortgage or not.

If he be right in this contention he is entitled to call in aid the 14th section of the Mercantile Law Amendment Act, 1856, which expressly refers to this section, and provides, with reference

(1) 43 Ch. D. 106.
(2) 30 Ch. D. 291.
(3) 22 Ch. D. 511.
(4) *Ibid.* 579.
(5) 19 L. R. Ir. 140.
(6) [1895] 2 Ch. 820.
(7) [1896] 1 I. R. 206.
(8) 18 L. R. Ir. 170.
(9) 5 A. & E. 291.
(10) 11 H. L. Cas. 115.

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to it, that a co-contractor or co-debtor is not to lose the benefit of the enactment by reason only of payment of interest by his co-contractor or co-debtor. If this were a correct view of the law it would become necessary to consider the effect of the payment of interest admitted to have been made in this case, and how far it affects the position of the defendant Alexander S. Irwin.

On the other hand, the plaintiff contends that the governing enactment is the 40th section of 3 & 4 Wm. 4, c. 27, which provides that no "action, suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage . . . unless in the meantime some part of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent." If this be the governing section, the Mercantile Law Amendment Act does not apply, and the plaintiff is clearly entitled to judgment.

Curiously enough, at the trial before Holmes, L. J., and during the first day on which the case was under argument in this Court, both parties overlooked the fact that twenty years had run in favour of the defendant Alexander Irwin before the Act of 1874 came into force; the plaintiff relying upon the 8th section of that statute, and the defendant contending that he was entitled to call in aid the Mercantile Law Amendment Act, by relying as a defence upon the 20th section of the Common Law Procedure Act of 1853.

Now in the state of facts which this line of argument assumed, the case appeared to us to be concluded by the authority of *Sutton* v. *Sutton* (1) and of *In re Frisby* (2). In *Sutton* v. *Sutton* (1) it was decided by the Court of Appeal in England, that the Statute of Limitations applicable to an action upon a covenant contained in a mortgage deed is the 8th section of the Act of 1874, and not 3 & 4 Wm. 4, c. 42, s. 3, corresponding to the 20th section of the Common Law Procedure Act (1853). This decision was followed by the Court of Appeal in Ireland in *Evans* v. *O'Donnell* (3) and recognised and applied in the cases of *Fearnside* v. *Flint* (4) and

(1) 22 Ch. D. 511.
(2) 43 Ch. D. 106.
(3) 18 L. R. Ir. 170.
(4) 22 Ch. D. 579.

In re Powers (1). In the face of these authorities it would have been impossible to adopt Mr. Wylie's suggestion that the defendant is at liberty to rely upon a totally different Statute of Limitations, simply because it suits him to call in aid the provisions of the Mercantile Law Amendment Act. The sole question is, What is the governing enactment? and that has been conclusively determined by *Sutton* v. *Sutton* (2).

When, however, attention was called to the dates in the present case, it became at once apparent that the question for our decision arises upon the Statutes of Limitations which were in force before the Act of 1874 came into operation. Was the Statute of Limitations; in regard to actions upon a covenant contained in a mortgage, 3 & 4 Wm. 4, c. 27, s. 40; or, in England, 3 & 4 Wm. 4, c. 42, s. 3, and in Ireland, the corresponding section of the Common Law Procedure Amendment Act (1853)?

Mr. Wylie was able to present a considerable body of evidence in support of the proposition that before *Sutton* v. *Sutton* (2) it was generally assumed that the governing enactment in the case of all actions of covenant was 3 & 4 Wm. 4, c. 42, s. 3. But before the Act of 1874 had substituted twelve years for twenty as the limit in the case of actions to recover money secured by mortgage, it was absolutely immaterial to consider which was the governing statute, so far as the statutory period was concerned. My own recollection bears out the statement made in the argument of *In re Frisby* (3), that the decision in *Sutton* v. *Sutton* (2) was a surprise to some members of the profession, at all events. In estimating the weight to be attached to the language of even the most eminent Judges, regard must be had to the facts and arguments to which they address themselves. In not one of the cases referred to by Mr. Wylie is there the faintest trace of a judicial decision or even an argument addressed to the conflict between the two statutes now before us. Nor is the evidence all the same way. Mr. Wylie relied mainly upon *Hunter* v. *Nockolds* (4) and *Sims* v. *Thomas* (5). But when those cases were cited by the present Lord Macnaghten, in arguing *Sutton* v. *Sutton* (2), Jessel, M.R.,

(1) 30 Ch. D. 291.
(2) 22 Ch. D. 511.
(3) 43 Ch. D. 106.
(4) 1 Mac N. & Gord. 640.
(5) 12 A. & Ell. 536.

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mentioned *Henry* v. *Smith* (1), where Lord Chancellor Sugden referred to a personal action upon a covenant in a mortgage deed as an "action in respect of a sum of money charged upon or payable out of real estate" (at p. 391).

In *Sutton* v. *Sutton* (2), however, the precise question arose. It is true that the decision was upon the construction of the 8th section of the Act of 1874. But, as I have pointed out, that section is in its language identical with the earlier Act, save that one numeral is substituted for another. I need not recapitulate the reasoning of the Judges who decided that case, but with the exception of a single observation of Jessel, M. R. (at p. 517), every word is equally applicable to the earlier statute. The grounds and the effect of that decision were shortly summarised by one of the Judges (Bowen, L. J.), in the subsequent case of *In re Powers* (3): "In a mortgage deed the money is secured on land, and is also either a specialty or a simple contract debt of the mortgagor. An action against the mortgagor for the debt is an action to recover money which is charged on land . . . In *Sutton* v. *Sutton* (2) we thought that an action by the mortgagor to recover the mortgage debt was none the less an action to recover money charged on land, because it was an action on covenant, and not a proceeding against the land."

The decision of Lord Cottenham in *Hunter* v. *Nockolds* (4), where he held, that although in actions brought to recover money issuing out of land only six years' interest could be allowed, yet that twenty years' could be recovered in a personal action was undoubtedly a difficulty in the way of the decision in *Sutton* v. *Sutton* (2). It is so recognised in the judgment of Cotton, L. J., and in the judgment of Kay, J., in the subsequent case of *In re Frisby* (5). But that difficulty having been got over, we are not now embarrassed by it. In the words of Porter, M.R. (*In re Nugent's Trusts* (6)), *Sutton* v. *Sutton* (2) may be treated "as practically getting rid of the anomalous results arising from the state of the law as exemplified in *Hunter* v. *Nockolds* (4), and cases of that class."

(1) 2 Dr. & War. 381.
(2) 22 Ch. D. 511.
(3) 30 Ch. D. at p. 297.
(4) 1 Mac N. & Gord. 640.
(5) 43 Ch. D. at p. 111.
(6) 19 L. R. Ir. 140.

Kay, J., notes, as "a curious result of the decision in *Sutton* v. *Sutton*"(1), that the application of the Mercantile Law Amendment Act was, upon the facts before him, excluded from the case (*In re Frisby* (2)). Precisely the same result follows from our present decision. But I cannot regard the result as strange or undesirable. Where money is advanced on mortgage, the personal obligation of the mortgagor, express or implied, is subsidiary to the principal security—the land. The entire transaction seems to fall more naturally within what I may call the mortgage limitation code, than within the limitation code governing the class of contracts to which a Mercantile Law Amendment Act is applicable. The framers of the 14th section of that statute did not intend to include all classes of contracts. They deliberately excluded 3 & 4 Wm. 4, c. 27, s. 40, from the operation of the section. There seems to be no reason why the section should be applicable to the subsidiary personal obligation, and not to the principal security. The conclusion that co-mortgagors are not co-contractors within the meaning of the Mercantile Law Amendment Act is, in my opinion, in entire accordance with the true nature of the security. For these reasons I think that the judgment for the plaintiff ought to stand.

MURPHY, J.:—

I agree with the judgment delivered by my brother Madden.

BOYD, J.:—

The statute 3 & 4 Wm. 4, c. 27, s. 40, has been repealed by 37 & 38 Vict. c. 57, s. 8, and the said section in the latter Act has been substituted therefor; the only difference in said section being the substitution of the period of twelve years for twenty years mentioned in section 40 of the former Act. The question then is, to what securities do these sections apply? It has been decided in *Sutton* v. *Sutton* (2) that they apply not only to the mortgage itself, but also to the personal remedy on the covenant contained in the mortgage for the payment of the money secured thereby. This being a decision of the Court of Appeal we are

(1) 22 Ch. D. 511. (2) 43 Ch. D. 106.

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bound to follow it. I may however observe that I fully concur with that decision. All through the former statute the meaning of the terms "action, suit, or other proceeding," are, in my opinion clearly defined, the former word being used in reference to proceedings at law, and the latter to proceedings in equity. There could then have been no proceeding for the recovery of the mortgage debt as against the lands except by a suit in a Court of Equity, and no proceeding on the personal covenant contained in the mortgage except by an action at law. I therefore think the governing statute applicable to the money secured by a mortgage on land was originally the 3 & 4 Wm. 4, c. 27, and that 3 & 4 Wm. 4, c. 42, had no reference thereto.

The Mercantile Law Amendment Act, 1856, applies expressly only to those actions mentioned in 21 James 1, c. 16, s. 3, and 3 & 4 Wm. 4, c. 42, and does not apply to those "actions or suits" referred to in 3 & 4 Wm. 4, c. 27. I am therefore of opinion that the Mercantile Law Amendment Act, 1856, has no application to an action on a covenant in a mortgage against a mortgagor or mortgagors, and that the learned Judge who tried the case was right in holding that the statute applicable to the present case is 37 & 38 Vict. c. 57, s. 8.

This being so, and interest having been paid by one of the mortgagors within a period of twelve years, the defendant and the other mortgagor is liable for the amount of the verdict found against him.

Solicitors for the plaintiff: *J. & J. Galloway.*
Solicitors for the defendant: *Simmons & M'Laughlin.*

J. P. B.

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ACTION TO RECOVER POSSESSION OF LAND—*Non-payment of rent—cross-ejectment—Estoppel—Eviction of portion of leasehold for non-payment of rent issuing out of the entire—Judgment null and void.*] *W. D.* held the lands (known as the *T.* and *E.* lands) of *C.* from the Bishop of Derry, for a term of twenty-one years, customarily renewable. In 1872 *W. D.* purchased from the Church Temporalities Commissioners the perpetuity, which was conveyed to him by indenture, dated the 21st October, 1872, subject to the yearly rent of £119 14*s.* 7*d.* By deed of equal date *W. D.* mortgaged the lands to the Commissioners, to secure £842 17*s.* 2*d.*, the amount of the purchase-money. The interest in the lands subject to the mortgage became vested in several persons, one denomination called *A.* and *T.* being vested in *W. D.*, and the other denominations by virtue of the statute in the several other persons, who, at the time of the grant in perpetuity, were the owners along with *W. D.*, of the interest in the ecclesiastical lease. In 1840, under a deed of family arrangement, the lands of *A.* had been made primarily liable to payment of the whole head rent by *O. D.*, the then lessee. *W. D.* died in 1876, having by will devised the lands of *A.* to *J. M'S.* in trust for *Grace D.* for life, with remainder to *J. D.* The perpetuity rent of £119 14*s.* 7*d.* became invested in *Edward D.*, and this having fallen into arrear, he brought, in 1883, an ejectment for non-payment of rent against all the lands comprised in the perpetuity grant. He discontinued this action, and brought a fresh ejectment on foot of the entire rent against the lands of *A.* alone, serving the writ only on *Grace D.* and *J. M'S.* and the under-tenants of *A.* *Grace D.* took defence, but subsequently gave a consent for judgment, which was entered on the 15th December, 1883, for the recovery of *A.*, and a habere was executed on the 2nd February, 1884, but *Grace D.* and the under-tenants were put back as caretakers. Subsequently they refused to give up possession, and an ejectment on the title was brought against them, judgment obtained by default, and a habere executed

ACTION TO RECOVER POSSESSION OF LAND—*continued.*

on the 4th May, 1886, under which *Edward D.* went into possession of *A.* On the 10th February, 1893, *J. M'S.*, *Grace D.*, and *J. D.* brought an ejectment against *Edward D.* to recover the lands of *A.* This resulted in a judgment for the defendant, which the plaintiffs now moved to change, relying on the invalidity of the previous ejectment proceedings as rendering the judgment therein a nullity:—*Held*, by the Queen's Bench Division, that *Grace D.* and *J. M'S.* were estopped from denying the identity of the lands sought to be recovered in that ejectment with those out of which the rent issued; that the plaintiff *J. D.*, in asserting an equitable claim as a volunteer under the settlement of 1840, could not, in the face of that deed, rely on the fact that the rent issued out of other lands, and not out of *A.* alone; and that accordingly the judgment for the defendant should stand. *Held*, by the Court of Appeal, reversing the decision of the Queen's Bench Division (*diss.* Porter, M.R.), that the judgment in the second action of ejectment was null and void, having been recovered in an action brought for the purpose of evicting portion only of the premises comprised in the perpetuity lease, and that it created no estoppel against the present plaintiffs. *M'Sheffry* v. *Doherty* [Q.B. 191; App. 210

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of the Interpretation Act, 1889, s. 23) of the Railways (Ireland) Act, 1851, with the Lands Clauses Act, 1845; that accordingly the machinery of the Act of 1845, not that of the Railways (Ireland) Act, 1851, should have been adopted for the purpose of ascertaining by arbitration the compensation to be paid; that thus the defendant not being properly appointed arbitrator, the proceedings were *coram non judice*; and that, therefore the *mandamus* should be refused. *Held* also (by the Queen's Bench Division), that where lands were so compulsorily acquired by the War Department for the purpose of a rifle range and camp, the owner of the lands taken would be entitled to compensation in respect of the injury (if any) to his adjoining lands injuriously affected by the execution of the works of the Secretary of State in the construction and formation of the rifle range and camp. *Quære.*—Whether the Crown was liable to the costs of the proceedings. *Reg.* (*Moore*) v. *Abbott* - - - Q. B. 362; App. 415

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GARNISHEE—*Prior charge on interest of judgment debtor—Tenants' rents—Receiver*.] A garnishee order only binds the attached debt to the extent to which the judgment debtor himself can deal with it. A judgment creditor obtained a conditional order attaching the tenants' rents of the lands of *C.*, payable to the judgment debtor. The Commissioners of Public Works were entitled to a charge on the lands, created in 1880, under the Relief of Distress (Ireland) Act, 1880, and the 37th section of 10 Vict. c. 32, incorporated therewith; and before the conditional order was made absolute the Commissioners obtained in the Chancery Division an order for a receiver over the lands of *C.*, and obtained leave to show cause against the conditional order:—*Held*, that the conditional order should be discharged. *O'Connor* v. *Ireland* [Ex. 150

GRAND JURY—Road—Trackway along river
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HARBOUR—Property used for public purposes —Rating - - - - - 516
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ILLICIT DISTILLATION—1 & 2 *Wm.* 4, *c.* 55, *ss.* 23, 49—*Petty Sessions* (*Ireland*) *Act*, 1851 (14 & 15 *Vict. c.* 93) *ss.* 21, 24, 42—20 & 21 *Vict. c.* 40, *s.* 6—21 & 22 *Vict. c.* 100, *s.* 140, *Sched. C—Stamp — Dismiss without prejudice — Appeal — Notice.*] The respondent was prosecuted at Petty Sessions on the 20th December, 1895, for having in his dwellinghouse spirits illegally distilled, whereon duty had not been paid. The Justices dismissed the case without prejudice. The respondent was afterwards summoned for having illicit spirits in his possession. On the hearing of this summons on the 15th May, 1896, the respondent objected *inter alia* that the summons was not stamped as required by 21 & 22 Vict. c. 100, sched. C, and the Justices dismissed the summons without prejudice. The prosecutor appealed. The notice of appeal was served on the Justices on the said 15th May, 1896, but the respondent having disappeared and his house being shut up, the prosecutor was unable to serve him with notice of the appeal, but posted the notice on the respondent's house on the 16th May, 1896, and lodged the notice on the same day with the Clerk of the Peace. Upon the hearing of the appeal the respondent was convicted and fined £6. On motion for a writ of *certiorari* to quash the conviction :—*Held*, 1, that, irrespective of the question whether a stamp was necessary upon a summons in a Revenue prosecution, the absence of a stamp did not, having regard to the 16th section of the statute 20 & 21 Vict. c. 100, deprive the Justices of jurisdiction to entertain and proceed with the case. 2. That an appeal lay from the order of the Justices dismissing the complaint. 3. That the service of notice of the appeal was sufficient. 4. That the "dismiss without prejudice" on the 20th December, 1895, was an authorised order, and that therefore, even assuming the causes of complaint to have been identical, and it was no bar to the subsequent prosecution in 1896. *Lawless, Appellant, M'Aleer, Respondent* - - Ex. 248

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JUDGMENT—Action to recover possession of land—Eviction of portion of leasehold for non-payment of rent issuing out of the entire - - - - - 191, 210
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—— Motion for—Overholding tenant—Derivative title - - - - - - 55
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JUSTICES — *Summary jurisdiction — Order—"Dismiss"—Appeal to Quarter Sessions—Game Act* (27 *Geo.* 3, *c.* 35, *Ireland—Petty Sessions* (*Ireland*) *Act*, 14 & 15 *Vict. c.* 93), *s.* 21.] In a prosecution under the Game Act, 27 Geo. 3, c. 35 (Ir.) if the case be dismissed, the Justices order at Petty Sessions should state whether the dismiss is on the merits or without prejudice, and an order of "Dismissed," simply, is wrong; but the party aggrieved still has his right of appeal therefrom to Quarter Sessions. In a prosecution for trespass in pursuit of game, the Justices entered their order on the Order Book as "Dismissed," and refused to add "on the merits," or "without prejudice." The prosecutors appealed to Quarter Sessions, and there at their own request, had the appeal struck out, as being from a bad order and untenable. They subsequently brought a second prosecution in respect of the same offence, and, on the Justices refusing to entertain it, applied for a mandamus to compel them to do so. The Court refused to grant the writ under the circumstances of the case, the prosecutors having had another remedy, which they had adopted and then, of their own motion, had abandoned. *Reg.* (*Bridges and Ram*) v. *Justices of County of Armagh* - - - Q.B. 236
—— Appeal — Recognisance — Fishery Acts—Several complaints joined in one summons - - - - - - 603
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—— Action to recover possession—Eviction of portion of leasehold for non-payment of rent issuing out of the entire 191, 210
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LICENSING ACTS—*License for sale of intoxicating liquors on and off the premises — Renewal — Certificate of Justices as to "the peaceable and orderly manner in which such house has been conducted in the past year"* (17 & 18 *Vict. c.* 89, *s.* 11) — *License lying dormant and unused during part of the preceding twelve months—Undertaking given by applicant not to use the license, or to use same in a limited manner only — Obligation to supply reasonable refreshment to all comers*—Certiorari *to quash certificate of Justices given for the renewal of publican's license.*] *D. & Co.* held a license for the consumption of intoxicating liquors "on and off" certain premises in Monaghan-street, Newry, originally obtained by them in 1890, on an undertaking then given by them to the Justices at sessions, that they would not use the premises so licensed as an ordinary public-house, or for the sale of intoxicants on the premises. This license was renewed from year to year without objection, the original undertaking being strictly carried out by *D. & Co.*, the licensed premises being used for storage and for bottling in

connexion with their main offices in another street, where they carried on the business of wholesale wine and spirit merchants. In August, 1895, they opened the premises in Monaghan-street, so licensed, as a branch office, for the sale therefrom of wines and spirits to their customers. At the Annual Sessions in September, 1895, when *D. & Co.* applied for a renewal of the license, Lambe, a publican, living in the same street, objected (on notice previously given) on the ground that the premises had not been used during the preceding twelve months for the sale of intoxicating liquors on the premises; that during the few weeks they had been open they had not been conducted in a peaceable and orderly manner, as *D. & Co.* had refused to supply refreshments to persons requiring the same, without just cause of refusal—this referring to an occasion when Lambe had sent two persons to purchase drink for consumption on the premises. There was no objection by the police. The Justices heard Lambe's objection, but granted the certificate. On motion to make absolute an order for a writ of *certiorari* to quash the certificate:—*Held*, that any member of the community may come forward and object to the renewal of a publican's license; that *certiorari* lies to remove and quash as well an order of Justices granting such certificate as an order refusing same; that (following *Reg.* (*Cox*) v. *Recorder of Dublin*, 16 L. R. Ir. 424) such an undertaking not to use a publican's license, or to use same in a limited manner, is ineffectual and void; that where premises licensed for the sale of intoxicating liquors have not been, in fact, conducted as a licensed house in the past year, it is not competent to the Justices to grant a certificate that they have been "conducted" in a "peaceable and orderly manner" in that period. *Per* Holmes, J.: The proprietor of a public-house licensed for the sale of intoxicating liquor on or off the premises is under no legal obligation to supply reasonable refreshment to all comers, so that his refusal so to do would disqualify him from applying for a renewal of his certificate, such refusal being, however, a matter which it is open to the Justices to consider when called on to certify to the good character of the applicant. *Reg.* (*Lambe*) v. *Justices of Co. Armagh* - - - Q. B. 57

2. —— *Spirit-grocer's license — Certificate of Justices—"Person dealing in or selling tea, cocoa-nuts, chocolate, or pepper"—Residence—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *ss.* 81, 82—*Licensing Act*, 1874 (37 & 38 *Vict. c.* 69), *ss.* 9, 10—*Mandamus.*] *G.*, a member of a firm of wine merchants in London, and himself living in London, applied to the Justices of county Fermanagh for the necessary certificate for a spirit-grocer's license (under 35 & 36 Vict. c. 94, s. 82, and 37 & 38 Vict. c. 69, ss. 9, 10) in respect of premises in Enniskillen, which had been acquired by his firm. The application having been refused on the ground that *G.* was not a "grocer" as defined in sect. 81 of 35 & 36 Vict. c. 94 (*i.e.* a person dealing in tea, cocoa-nuts, chocolate, or pepper), *G.* applied for and obtained a conditional order for writs of *certiorari* to remove the order of refusal and of mandamus to compel the Justices to rehear the matter. On motion to make absolute the conditional order:—*Held* (*per* Sir P. O'Brien, L.C.J., and Gibson, J., *diss.* O'Brien, J.), that the Justices were wrong in holding that because the applicant was not at the date of the application to the Justices dealing in any of these commodities, he was therefore not entitled to the certificate, it being for the Excise to ascertain the existence of this qualification when issuing the license; but *held* further (*per* Sir P. O'Brien, L.C.J., and Gibson, J., *diss.* O'Brien, J.), that *G.* was not resident within the Petty Sessions District; that the Justices therefore would not have jurisdiction to grant the certificate applied for, and that accordingly it would be futile to direct the writs to issue. *Reg.* (*Gilbey*) v. *Justices of Co. Fermanagh* - - - - Q. B. 559

LIMITATIONS, STATUTE OF—*Contribution—Co-contractors—Promissory note—Right of one of several co-debtors, compelled to pay the common debt, to contribution against his co-debtors, where, by the operation of the statute, the remedy of the creditor against those others was already barred at the time of such payment—Common Law Procedure* (*Ireland*) *Act*, 1853 (16 & 17 *Vict. c.* 113), *ss.* 20, 24—*Mercantile Law Amendment Act*, 1856 (19 & 20 *Vict. c.* 97), *s.* 14.] *A*, *B*, and *C* were jointly and severally bound, as principals, on a promissory note given to a banking company, dated 28th April, 1882, and payable six months after date. *A's* executor (the plaintiff), who had made payments on foot of the note within six years from its maturity, and, in 1891, within six years from the last of such payments, had paid to the bank the sum of £1844 in full discharge of the debt, sued *B* and *C's* executors for their shares in this amount so paid, as being money paid for their use and at their request, and obtained verdict and judgment. *B*, who had given no acknowledgment, nor paid anything since the note was signed, moved that judgment should be entered for him on the ground that the plaintiff's right of action was statute-barred, there being, in 1891, no common liability to the creditor, and therefore no right to contribution or indemnity, and on the ground that section 14 of the Mercantile Law Amendment Act, 1856, protected *B* from liability not only to the creditor, but also to his co-debtors:—*Held*, by the Queen's Bench Division, and *affirmed* by the Court of Appeal, that the plaintiff was entitled to retain his judgment; that, in regard to the right to con-

LIMITATIONS, STATUTE OF—*continued.*
tribution between co-debtors, the Statute of Limitations only commences to run from the date at which one of them is damnified by being compelled to pay more than his just share of the common debt; and that section 14 of the Mercantile Law Amendment Act, 1856, was intended only to give protection against the common creditor, and did not affect the rights and liabilities of the co-contractors *inter se*. *Wolmershausen* v. *Gullick* ([1893] 2 Ch. 514) approved. *Gardner* v. *Brooke and others* - - - - Q. B. 6; APP. 20

2. —— *Covenant in mortgage deed—Payment of interest by one of several mortgagors*—3 & 4 *Wm.* 4, *c.* 27, *s.* 40 — 3 & 4 *Wm.* 4, *c.* 42, *s.* 3 — 16 & 17 *Vict. c,* 113, *s.* 20 — 37 & 38 *Vict. c.* 57, *s.* 8 — 19 & 20 *Vict. c.* 97, *s.* 14.] In a mortgage deed of land, dated in 1853, *A* and *B*, the mortgagors jointly and severally covenanted with *C*, the mortgagee, for payment of principal and interest. Interest was paid by *A* to the time of action brought. Neither principal nor interest was paid by *B*. In an action on the covenant against *A* and *B*:—*Held*, that the payments by *A* prevented the Statute of Limitations from running in favour of *B*. The Mercantile Law Amendment Act (19 & 20 Vict. c. 97), s. 14, does not apply to a personal action brought to recover money secured by a mortgage of land. *Bailie* v. *Irwin* - - Q. B. 614

LIQUIDATED DEMAND—*Practice—R. C. S. I., Order III., R.* 6—*Judgment in default of appearance.*] When by a building agreement the defendant agreed with the plaintiff to execute certain works according to plans and specifications by a certain date to the satisfaction of the plaintiff's engineer, and that if not then completed the defendant should be liable to "a penalty as liquidated damages" of £5 a-week until completion. In an action for £160, claiming £5 a-week for thirty-two weeks delay in completion of the work:—*Held*, a liquidated demand within Order III., R. 6, for which in default of appearance the plaintiff was entitled to judgment under Order XIII., Rule 3. *Toomey* v. *Murphy* - - - - Q. B. 601

MANDAMUS — Government arbitrator — Compensation - - - 362, 415
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MANURE—Unloading within Sanitary District—Railway Co.—Public Health Act, 1878, s. 107. - - - - - - 340
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MARKET—Tolls—Rating - - - 552
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MASSES — *Charitable bequest — Masses for the repose of testator's soul—Celebration publicly in Roman Catholic Church—Purpose merely charitable —Legacy duty — Exemption*—5 & 6 *Vict. c.* 82, *s.* 38.] A bequest to a Roman Catholic priest, to be applied for Masses to be celebrated publicly in a specified Roman Catholic church in Ireland for the repose of the testator's soul, is a valid charitable bequest, and exempt from legacy duty under the 38th section of the 5 & 6 Vict. c. 82. *Attorney-General* v. *Hall* - - - - - APP. 426

MASTER AND SERVANT—*Non-liability of fishery owner for criminal act of his servant, done contrary to his orders.*] The respondent, owner of an eel-weir in the Upper Shannon, was prosecuted before Justices, under the Fishery (Ireland) Act, 1848, sect. 22, for fishing same on the 11th January, 1896, without being first duly licensed. He had in October, 1895, taken out the usual yearly licence for the weir, and contended that, under this licence, he was entitled to fish the weir until the end of the fishing season, viz. the 31st January following,—the open season for eel fishing in the Upper Shannon extending from the 1st July to the 31st January. The weir had been fished on the date in question by the respondent's servants; but the respondent proved to the satisfaction of the Justices (who dismissed the case) that he was himself absent at the time, and had, before leaving, given express directions to his servants not to fish the weir after the 1st January. On Case Stated,—*Held*, that the respondent was not liable for the illegal acts of his servants done contrary to his orders, and that the Justices were correct in dismissing the complaint. *Hosford, Appellant*; *Mackey, Respondent* - - - Q. B. 292

—— Act of servant resulting through intervening act of third parties in personal injury
See NEGLIGENCE. [301, 313

MORTGAGE—Action on covenant—Payment of interest by one of several mortgagors—Statute of Limitations - - 614
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MOTION FOR JUDGMENT—Action to recover possession of land—Derivative title of plaintiff - - - - 55, 234
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MUNICIPAL BOUNDARY—Holding, whether urban - - - - - 352
See FAIR RENT. 2.

NEGLIGENCE—*Master and servant—Liability of master—Act of servant resulting, through intervening act of third parties, in personal injury—Railway Company.*] A railway porter wheeled a barrow with luggage thereon to a side entrance to the defendants' station at Derry, and left it stationary close to the top of some steps leading down to the public footpath outside. Some badge-porters, licensed by the Corporation of Derry, but not employed by or subject to the control of the defendant Company, rushed up the steps—as was usual when

NEGLIGENCE—*continued.*
the constable whose duty it was to keep them off the platform and to maintain order amongst them was absent, as he was on this occasion—and, in a struggle for the luggage, upset the barrow and trunks. These tumbled down the steps and injured the plaintiff, a passenger, who was waiting on the footpath for his luggage to be brought out. *Held*, that, on these facts, the plaintiff (who had sued the defendants for the negligence of their servant, and whose case had at first been that the porter had himself wheeled the barrow over the steps) was not entitled to recover. *Murphy* v. *Great Northern Railway Co.* - Q. B. 301; APP. 313
—— Poor Law Guardians—Fever patient 76
See POOR LAW.
—— Railway Company—Injury to passengers—Action not disconnected with contract
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NON-AGRICULTURAL HOLDING—Extension of municipal boundary—Fair rent
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NOTICE—Appeal—Revenue prosecution—7 & 8 Geo. 4. c. 53, s. 83 - - - 248
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—— Application to fix fair rent—Service of during first sitting—Commencement of statutory term - - - - - - 30
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—— Application to vary tithe rentcharge—Principal outer door of place of religious worship - - - - - - 21
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—— Arrangement—Principal and surety 92, 107
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NUISANCE—*Public Health (Ireland) Act*, 1878 (41 & 42 *Vict. c.* 52), *s.* 107—"*Accumulation or deposit*"—*Railway Company—Manure carried by Railway Company to and from, and loaded and unloaded at, a station within the limits of a rural sanitary authority.*] The Great Northern Railway Company carried for delivery to customers, and loaded and unloaded manure at their station at Lurgan. The urban sanitary authority of Lurgan (in the centre of which town the station was built) obtained an order of Justices under the Public Health (Ireland) Act, 1878, prohibiting the Company from loading or unloading manure on any part of their station or line within the district that was less than one hundred yards from any dwelling-house. On Case Stated:—*Held*, that this did not constitute a nuisance within the Act, and that the order of the Justices was therefore wrong. *Great Northern Railway Co., Appellants*; *Lurgan Town Commissioners, Respondents* - - Q.B. 340
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OUTER DOOR—Principal place of religious worship—Notice of application to vary tithe rentcharge - - - 21
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OVERHOLDING—*Practice—Motion for final judgment on specially indorsed writ—R. S. C., Ir.*, 1891, *Ord. III., R.* 6 (*F*); *Ord. XIV., R.* 1—*Ejectment for overholding—Derivative title.*] The assignee of a landlord may obtain judgment upon motion, under Gen. Ord. XIV., R. 1, for possession of premises overheld, upon the expiration of the letting, where the writ is specially indorsed, pursuant to Gen. Ord. III., R. 6 (F). *Kane* v. *Brownrigg* - - - - - - Ex. 55
PASSENGER — Injury to—Railway company—Action not disconnected with contract
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PATIENT—Fever hospital — Negligence—Poor Law Guardians - - - 76
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PAYMENT—By one of several co-debtors—Statute of Limitations - 6, 20, 614
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—— Action to recover possession of land—Counterclaim - - - - - - 140
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POOR LAW—*Negligence—Poor Law Guardians Liability for negligence of official—Fever patient in workhouse hospital—Death accelerated by want of proper care—Lord Campbell's Act.*] Guardians of the poor are not answerable in damages in thair corporate capacity for injuries caused by the negligence of their officials in the treatment of poor patients received into workhouse hospitals. The plaintiff sued the guardians of Ardee Union, under Lord Campbell's Act, for damages in respect of the negligence of the officials of the guardians by which the death of her son, a patient in the workhouse hospital, was accelerated, if not caused:—*Held*, affirming the decision of the Exchequer Division, that the action did not lie against the guardians for the negligence of their officials. *Dunbar* v. *Guardians of Ardee Union* - - - - - APP. 76

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—— Action to recover possession of land—Land Law (Ireland) Act, 1896, s. 16—Writ of restitution - - - 112, 116
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—— Case stated—23 Vict. c. 4—Finality of decision - - - - - - 157
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—— Certiorari—Costs against unsuccessful applicant - - - - - - 513
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—— Execution—Sheriff's fees—Liability of solicitor - - - - - - 455, 459
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—— Garnishee - - - - - - 150
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—— Judgment—Default of appearance—Liquidated demand - - - - 601
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—— Judgment—Entry of—Claim and counterclaim — Defence—Costs—Order XXI., R. 17 - - - - - 314, 327
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—— Payment into Court—Acceptance in satisfaction of claim—Certificate—R. S. C. 1893 Order LXV., R. 4 - - - 127
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PUBLIC HEALTH ACT, 1878—s. 107—Manure carried and unloaded by Railway Company - - - - - 340
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RAILWAY COMPANY—Act of servant resulting, through intervening act of third party, in personal injuries - 301, 313
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—— Carriage and unloading of manure within sanitary district - - - 340
See NUISANCE.

—— Injury to passenger—Negligence—Action not disconnected with contract—Costs 572
See TAXATION OF COSTS. 1.

RATES—*Borough rates—Market tolls—"Occupy"—The Towns Improvement (Ir.) Act*, 1854 (17 & 18 *Vict. c.* 103), *sect.* 60—*The Towns Improvement Clauses Act*, 1847 (10 & 11 *Vict. c.* 34), *sect.* 167.] The tolls and customs of fairs and markets within the limits of a borough governed by Commissioners constituted under the Towns Improvement (Ireland) Act, 1854, are not chargeable with borough rates under section 60 of that Act. *Redington* v. *Millar*

RATES—*continued.*
(24 L. R. Ir. 65) followed. *Ennis Town Commissioners* v. *Macbeth* - - - Q. B. 552

2. —— *Borough rates — "Occupier" — Rent issuing out of premises used for public or charitable purposes — The Towns Improvement (Ireland) Act*, 1854 (17 & 18 *Vict. c.* 103), *ss.* 1, 60—*The Valuation Act*, 1854 (17 & 18 *Vict. c.* 8), *s.* 2.] The lessor of premises, let and used for public or charitable purposes, within the limits of a borough governed by Commissioners constituted under the Towns Improvement (Ireland) Act, 1854, is not chargeable under sect. 60 of that Act, to borough rates in respect of half the annual rent derived therefrom, though such half rent is included in the General Valuation Lists, pursuant to sect. 2 of the Valuation Act, 1854. *Greene* v. *Thornton* (16 L. R. Ir. 381) discussed. *Shillington* v. *Montgomery* - - - - - - Q. B. 598

3. —— *Exemption — Cemetery — Hereditaments "used exclusively" for charitable purposes—"Private profit or use"—Poor Law (Ireland) Act*, 1838 (1 & 2 *Vict. c.* 56), *s.* 63—*The Valuation (Ireland) Acts*, 1852 *and* 1854 (15 & 16 *Vict. c.* 63, *s.* 16, *and* 17 & 18 *Vict. c.* 8, *s.* 2)—*Finality of the decision of the High Court on Case Stated under sections* 10 *and* 11 *of the Valuation Revision (Ireland) Act*, 1860 (23 *Vict. c.* 4)—*Statute.*] In 1830 certain lands near Dublin were vested in a Committee, to be held in trust to be used as a burial ground, the surplus income arising from burial fees, &c., after the payment of expenses, to be applicable, under the sanction of the Roman Catholic Archbishop of Dublin, to the maintenance of a certain Model School in Dublin, or schools of the same kind, or for the purchase and acquisition of other burial grounds, such surplus income to be handed over to the Archbishop, and to be applied by him towards the support of the school, "so long as" he "should think fit," and if he should think that "any other application" thereof should be made, the majority of the Committee, with his sanction, should have power to "determine on the future application of such moneys." In 1846 the governing body was reconstituted as "The Dublin Cemeteries Committee," under statute (9 & 10 Vict. c. cclxi), "for the maintenance, improvement, and extension of the cemeteries" (of Golden Bridge and Glasnevin). Section 14 of this Act provided that the Committee should maintain the cemeteries and chapels and buildings thereon, and authorised the sale of rights of burial; and section 20 enacted that the surplus income, if any, should "from time to time be applied in such manner as to the majority of the governing body should seem fit." By section 6 a power to make bye-laws for the better order of their proceedings, and the management and maintenance of the burial grounds, was conferred on the Committee. In 1876, by bye-laws purporting to be made under

RATES—*continued.*
this section, it was provided that portion of the annual income arising from the cemeteries should be funded annually "for the purpose of making provision for the extinguishment of rents," and that after the surplus for each year should be ascertained the same should be distributed amongst Dublin charitable institutions, with the approval of the Archbishop. Since that date all surplus—after payment of head-rents, fees to sub-committees, salaries, wages, and other outgoings, and after setting apart a certain portion of the residue, and investing same for the purpose of redeeming head-rents—was distributed among such charitable institutions. The revenues of the undertaking consisted as well of grazing rents for lands not yet appropriated for burial ground, and of interest on moneys so invested, as of burial fees, &c. The Commissioner of Valuation having entered these lands upon the Valuation Lists as rateable, the Dublin Cemeteries Committee appealed to the Recorder of Dublin. They contended that, under the Irish Poor Law Act, 1838 (1 & 2 Vict. c. 56), s. 63, no burial ground or cemetery was rateable; that these lands and premises were within the exemption of that section, as being a burial ground from which "no private profit or use" was derived; and that they were entitled to have the same distinguished on the Lists as exempt, under section 2 of the Valuation Act, 1854 (17 & 18 Vict. c. 8), as being "exclusively used for charitable purposes." On Case Stated for the opinion of the Queen's Bench Division:—*Held* (O'Brien, *J.*, *diss.*), that the hereditaments were not "used exclusively for charitable purposes" within section 2 of the Valuation Act of 1854; that, under the Private Act of 1846, there was no trust binding the Committee to apply the surplus profits of the undertaking in charity, the bye-laws above mentioned being *ultra vires*; that the application in charity of the whole or portion of the net profits of such an undertaking (whether this were done in the discretion of the governing body, or even in the execution of some trust binding them to make such application thereof) would not bring the undertaking within the provisions of that section; and that, accordingly, the Commissioner of Valuation was correct in not distinguishing these hereditaments upon the Lists as so exempt. *Quære* —How far is sect. 63 of the Poor Law (Ireland) Act, 1838, affected by the provisions of the Valuation Acts, 1852 and 1854? *Semble*, the decision of the Divisional Court upon a Case Stated for their opinion upon a question of valuation or exemption, under 23 Vict. c. 4, ss. 10 and 11, though "final and conclusive on all parties as to amount," still leaves it open to a person assessed in pursuance thereof to question his liability when sued for rates. *Dublin Cemeteries Committee, Appellants*; *Commissioner of Valuation, Respondent* - Q.B. 157

RATES—*continued.*

4. —— *Exemption — Property "dedicated to or used for public purposes"—Belfast Harbour Commissioners—Poor Law (Ireland) Act*, 1838 (1 & 2 *Vict.* c. 56), *s.* 63—*Valuation Acts*, 1852 *and* 1854 (15 & 16 *Vict. c.* 63, *ss.* 15, 16; 17 *Vict. c.* 8, *s.* 2) — *Statute, interpretation of.*] The Commissioner of Valuation having included the property of the Belfast Harbour Commissioners in the revised lists of rateable hereditaments for the year 1896, the Harbour Commissioners appealed to the Recorder of Belfast, who allowed the appeal, but at the request of the Commissioner of Valuation stated a case for the opinion of the Court. Under certain local Acts the Belfast Harbour Commissioners, incorporated for the maintenance and improvement of the harbour, have vested in them the harbour and docks formerly held by a corporation, with power to borrow money, to acquire land, and to levy tolls and duties. They have raised considerable sums on bonds, have improved and extended the harbour and docks, and maintain and light the same. Their revenue, derived from the harbour and dock rates, quayage, storage and other dues, from the use of certain ferries owned by them, from rents of property and from interest on investments, is sufficient, after discharging the expenses of maintaining and improving the property held by them, and paying the interest on their bonded debt, to leave an annual surplus of considerable amount. Under a statute of 1882 their powers were further enlarged; a sinking fund was established for the repayment of borrowed moneys; and it was provided that the surplus revenue (if any) should be expended as the Commissioners might think fit in improving, or otherwise for the benefit of, the port and harbour: —*Held* (*per* O'Brien and Gibson, JJ., *diss.* Madden, J.), that the Court was bound by the judgment of the Exchequer Chamber in *The Londonderry Bridge Case* (I. R. 2 C. L. 577), to refuse to apply to the Irish Valuation Acts the rule of construction afforded by the decision on the 43 Eliz. c. 4, of the House of Lords in *The Mersey Docks Trustees* v. *Cameron*, 11 H. L. Cas. 443); that the property of the Belfast Harbour Commissioners must be held to be "dedicated to or used for public purposes," and within the exemption of the Valuation Acts, as interpreted by *The Londonderry Bridge Case*; and that the Recorder was therefore correct in allowing the Harbour Commissioners' appeal. *Per* Madden, J. (*diss.*), that, as the property of the Commissioners was not devoted to supplying ultimately a harbour to be used toll free by the public *The Londonderry Bridge Case* did not apply; that sect. 63 of the Irish Poor Law Act of 1838 could not be construed by reference to erroneous English decisions then current but since overruled; and that the property of the Commissioners was not within the exemption from rating of section 63, whether construed upon its own terms in their ordinary acceptation or interpreted in the light of *The Mersey Docks Trustees* v. *Cameron*. *Belfast Harbour Commissioners* v. *Commissioners of Valuation* [Q. B. 516

RATES—*continued.*

RECEIVER—Over interest of judgment debtor —Garnishee order - - - 150
See GARNISHEE.

RECOGNISANCE — *Summary Jurisdiction — Appeal—Several complaints joined in one summons —Petty Sessions (Ireland) Act*, 1851 (14 & 15 *Vict. c.* 93), *s.* 24—*County Courts and Officers (Ireland) Act*, 1877 (40 & 41 *Vict. c.* 56), *s.* 74.] Where, in a prosecution before Justices at Petty Sessions under the Fishery Laws, four persons were joined as complainants, and (the complaint having been dismissed) only one of the four entered, in appealing, into the statutory recognisances:—*Held*, that he was entitled to prosecute the appeal. *Reg.* (*Gibson*) v. *Justices of Fermanagh* Q. B. 603

REDEMPTION OF RENT — *Redemption of Rent (Ireland) Act*, 1891 (54 & 55 *Vict. c.* 57), *s.* 1 — *Redemption price — Suitability of holding for building ground—Probability of its conversion into such.*] In determining the sum to be paid for the redemption of a rent, under the Redemption of Rent (Ireland) Act, 1891 (54 & 55 Vict. c. 57), the Land Commission may take into account the suitability of the holding for building ground, or the probability of any portion of it being converted into such. *Macartney, Grantor; Gordon, Grantee* [LAND COM., 1

REDEMPTION OF TENANCY—Land Law (Ireland) Act, 1896, s. 16 - 112, 116
See WRIT OF RESTITUTION.

REINSTATEMENT OF TENANT — Land Law (Ireland, Act, 1896, s. 50, sub-sect. 2
See RESUMPTION BY LANDLORD. [357

RENEWAL OF LICENCE—Justices' certificate—Dormant license - - 57
See LICENSING ACTS. 1.

RENT—Garnishee order - - - 150
See GARNISHEE.

—— Redemption of - - - - 1
See REDEMPTION OF RENT.

RESIDENCE—Spirit grocer - - 559
See LICENSING ACTS. 2.

RES JUDICATA—Judgment in ejectment for non-payment of rent — Restitution to possession—Land Law (Ireland) Act, 1896, s. 16 - - - - 112, 116
See WRIT OF RESTITUTION.

RESTITUTION, WRIT OF - 112, 116
See WRIT OF RESTITUTION.

RESUMPTION BY LANDLORD—*Land Law (Ireland) Act*, 1887, *s.* 7—*Land Law (Ireland) Act*, 1896, *s.* 12; *s.* 50, *sub-s.* 2—*Future tenancy*—

RESUMPTION BY LANDLORD—*continued.*
Reinstatement.] The reinstatement required by sect. 50, sub-sect. (2) Land Law (Ireland) Act, 1896, 59 & 60 Vict. c. 47, to entitle a tenant, possession of whose holding has been resumed by the landlord, to be deemed a present tenant, is not a reinstatement in the holding but in the tenancy existing prior to the eviction. A superior landlord having recovered judgment in an ejectment for non-payment of rent against his immediate tenant, the notices prescribed by sect. 7 of the Land Law (Ireland) Act, 1887, were duly served on the sub-tenants in occupation. After the time for redemption had expired a writ of possession was issued, and on its execution the physical possession of the lands constituting the holdings of some of the sub-tenants was not disturbed, but they signed agreeements in writing to become tenants to the superior landlord of their former holdings, which were therein described as being then in the landlord's possession:—*Held*, that the landlord should be treated as having resumed possession of these holdings within the meaning of sect. 50, sub-sect. (2), of the Land Law (Ireland) Act, 1896. *Hines, Landlord; Bell and others, Tenants* [Land Com., 357

REVENUE—Legacy duty—Exemption—Bequest for masses to be celebrated in public *See* Masses. [426

—— Prosecution—Illicit distillation - 248
See Illicit Distillation.

REVOCATION OF PROBATE—*Charitable bequest—Legatee in trust—Non-liability for money applied in good faith, in accordance with the provisions of alleged will.*] Probate of an alleged will having been granted in common form to the executors named therein, they paid a charitable bequest to the defendant, who *bona fide* and without any notice of the invalidity of the alleged will, applied portion thereof in accordance with the trusts of the bequest. Probate was afterwards revoked (not by consent), and letters of administration of the personal estate of the deceased, as dying intestate, were granted to the plaintiff:—*Held*, that the plaintiff could not recover from the defendant the amount which the latter expended in execution of the supposed trusts. *Fitzpatrick* v. *M'Glone* [Ex. 542

RIFLE RANGE—Compulsory purchase—Mode of procedure - - - 362, 415
See Compulsory Purchase.

RIVER—Trackway—Obstruction—Unloading of timber - - - - - - 143
See Road.

ROAD—*Summary Jurisdiction (Ireland) Act*, 1851 (14 & 15 *Vict. c.* 92, *s.* 10 (5))—*Public road—Obstruction—Grand Jury Act* (6 & 7 *Wm.* 4, *c.* 116, *s.* 119)—*Trackway—Unloading of timber.*] The statute 28 Hen. 8, c. 22 (Ireland), after providing

ROAD—*continued.*
for the passage of boats, merchandises, &c., along the River Suir, enacted that boatmen, merchants, and others should have, if needful, 7 feet of plain ground on each side of the said river, for the drawing, taking, loading, &c., of boats, without any impediment on the part of any person. The Grand Jury for the South Riding of county Tipperary, acting under the provisions contained in 6 & 7 Wm. 4, c. 116, as amended by 36 & 37 Vict. c. 34, presented and expended £100 a-year in keeping the said way in repair (and in their presentment described the said way as a "trackway"), so far as was required for the haulage of boats, but not for vehicular traffic. The appellant was prosecuted at Petty Sessions for depositing timber upon the public road (the said trackway) contrary to the provisions of 14 & 15 Vict. c. 92, s. 10 (5). On the said hearing it was proved that, although the appellant deposited the timber on the trackway, the timber so deposited did not interfere with the haulage of boats. The Justices held (*inter alia*) that the trackway was a public road within 14 & 15 Vict. c. 92, and convicted the appellant:—*Held*, on case stated, that there was no evidence that the said trackway was a public road within 14 & 15 Vict. c. 92, and that the conviction was wrong, and should be reversed. *Condon, Appellant; Duffy, Respondent* - - - - Ex. 143

SALE OF GOODS—Contract price—Defence and counterclaim alleging inferiority [314, 327
See Taxation of Costs. 3, 4.

SALE OF TENANCY.—*Landlord and tenant—Assignment by tenant in* 1895—*No notice of intention to sell—Proceeding by landlord to set aside sale pending at commencement of Land Law (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 47)—*Alienation otherwise than for consideration in money or money's worth—Section* 19 *of Act—Retrospective effect—Section* 50 (1).] The effect of section 50 (1) of the Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47), is that in cases pending at the commencement of the Act the rights and obligations of the parties are to be determined in accordance with the law as altered by the several provisions of Part I. thereof, save where such provisions are expressly prospective. In 1895 a tenant, without giving any notice to the landlord of his intention so to do, assigned his holding to one person. The landlord, before the commencement of the Act of 1896, served an originating notice to have the sale declared void. The application came on for hearing after the commencement of the Act, when the Court were of opinion that the transaction was an alienation otherwise than for consideration in money or money's worth:—*Held*, that the provisions of section 19 of the Act were not to be restricted to alienations after the passing of the Act, that they

SALE OF TENANCY—*continued.*
governed the rights of the parties in these proceedings, that regulation (5) of section 1 of the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), did not apply, and that the relief sought could not then be granted. *Fox, Tenant; Gloster, Landlord* - - - - LAND COM., 35

SANITARY DISTRICT — Unloading manure within — Railway Co. — Public Health Act, 1878, s. 107 - - - 340
See NUISANCE.

SEPARATE CAUSES OF ACTION—Costs—Taxation - - - - 258, 270
See TAXATION OF COSTS. 5.

SERVANT.
See MASTER AND SERVANT.

SHERIFF — *Fees on execution — Liability of solicitor—Rules of Supreme Court*, 1893—*Order LXV., Rule* 90.] A solicitor who issues a writ of *fieri facias* and hands it to the sheriff becomes, on the execution or return of the writ, personally liable to pay the sheriff the fees prescribed in the schedule contained in Appendix S, Part iv., of the Rules of the Supreme Court, 1893. *Farrelly* v. *Lynch* [Q. B. 455; APP. 459

2. —— Fi. fa.—*Postponement of sale—Solicitor for execution creditor—Managing clerk—Authority.*] Although an execution creditor or his solicitor, after delivery of the writ to the sheriff, may withdraw the execution, or postpone the sale of chattels seized under it, there is no implied power in the managing clerk of the solicitor to do so, notwithstanding that the clerk is left in charge of the solicitor's office and professional business during the temporary absence of his employer. Accordingly where, during the absence from Ireland of the solicitor for an execution creditor, the managing clerk of the creditor's solicitor, who was in charge of his office and business, required (without being expressly so authorized) the sheriff to postpone for two days the sale of goods seized under a writ of *fi. fa.*, and the sheriff refused to do so:—*Held*, that the execution debtor could not sustain an action against the sheriff for illegally proceeding with the sale. *Whyte* v. *Nutting* - - - EX. 241

SOLICITOR—Fees on execution—Liability
See SHERIFF. 1. [455, 459

—— Managing clerk—Sale under *fi. fa.*—Postponement - - - - 241
See SHERIFF. 2.

SPECIALLY INDORSED WRIT—*Practice—Ejectment for non-payment of rent by assignee of lessor—R. S. C., Ir.*, 1891, *Order III., Rule* 6; *Order XIV., Rule* 1.] Though the assignee of a lessor will, in Ireland, in an action to recover the demised premises for non-payment of rent, be given liberty to mark judgment summarily upon motion under R. S. C., 1891, Order XIV., Rule 1, on a writ of summons specially indorsed, such liberty

SPECIALLY INDORSED WRIT—*continued.*
will not be granted unless it is stated or shown in the indorsement that the lessor's interest has become vested in the plaintiff, or that otherwise there is a subsisting contract of tenancy between the parties. *Keenan* v. *Carson* - - Q. B. 234

—— Overholding—Derivative title - - 55
See OVERHOLDING.

SPIRIT GROCER — Justices' certificate for license—Applicant not dealing in tea, &c.—Residence - - - - - 559
See LICENSING ACTS. 2.

STAMP — Summons — Revenue prosecution — Jurisdiction - - - - 248
See ILLICIT DISTILLATION.

STATUTE OF LIMITATIONS.
See LIMITATIONS, STATUTE OF.

STATUTES:—
27 Geo. 3, c. 35 (Ir.)—Game. - - 236
See JUSTICES.
4 Geo. 4, c. 99—Tithe Composition, ss. 25, 43 [271, 287
See TITHE RENTCHARGE. 1, 2.
——— s. 43 - - - 21, 486, 606
See TITHE RENTCHARGE. 3, 5.
7 Geo. 4, c. 29—Subletting - - - 130
See SUBLETTING. 2.
7 & 8 Geo. 4 c. 53—Collection of Revenue, s. 83
See ILLICIT DISTILLATION. [248
1 & 2 Wm. 4, c. 55—Illicit making of malt and distillation of spirits, ss. 23, 29 - 248
See ILLICIT DISTILLATION.
2 & 3 Wm. 4, c. 119—Tithe rentcharge, s. 6 606
See TITHE RENTCHARGE. 5.
3 & 4 Wm. 4, c. 42—Limitations, s. 3 - 614
See LIMITATIONS, STATUTE OF. 2.
6 & 7 Wm. 4, c. 116—Grand Juries, s. 119 143
See ROAD.
1 & 2 Vict. c. 56—Poor Law, s. 63 - 157, 516
See RATES. 3, 4.
1 & 2 Vict. c. 109—Tithe rentcharge, s. 32 [271, 287
See TITHE RENTCHARGE. 1, 2.
5 & 6 Vict. c. 82—Stamp duties, s. 38 - 426
See MASSES.
5 & 6 Vict. c. 94—Defence - - 362, 415
See COMPULSORY PURCHASE.
5 & 6 Vict. c. 106—Fisheries, ss. 30, 36 - 290
See FISHERY ACTS. 1.
8 Vict. c. 18—Lands Clauses - - 362, 415
See COMPULSORY PURCHASE.
10 & 11 Vict. c. 34—Towns Improvement Clauses, s. 167 - - - - - 552
See RATES. 1.
11 & 12 Vict. c. 92—Fisheries, ss. 22, 28 292
See FISHERY ACTS. 2.
MASTER AND SERVANT.
14 & 15 Vict. c. 70—Railways - 362, 415
See COMPULSORY PURCHASE.

STATUTES—*continued.*
14 & 15 Vict. c. 92—Summary jurisdiction, s. 10 (5) - - - - - - - 143
See ROAD.
14 & 15 Vict. c. 93—Petty Sessions, s. 21 236
See JUSTICES.
—— ss. 21, 24, 42 - - - - - 248
See ILLICIT DISTILLATION.
—— s. 24 - - - - - - - - 603
See RECOGNISANCE.
15 & 16 Vict. c. 63—Tenement Valuation, s. 16
See RATES. 3, 4. [157, 516
16 & 17 Vict. c. 113—Common Law Procedure, ss. 20, 24 - - - - - 6, 20, 614
See LIMITATIONS, STATUTE OF. 1, 2.
—— s. 243 - - - - - - - - 572
See TAXATION OF COSTS. 1.
17 Vict. c. 8—Tenement Valuation, s. 2
See RATES. 2–4. [157, 516, 598
17 & 18 Vict. c. 89—Sale of spirits, s. 11 - 57
See LICENSING ACTS. 1.
17 & 18 Vict. c. 103—Towns Improvement, ss. 1, 60
See RATES. 1, 2. [552, 598
19 & 20 Vict. c. 97—Mercantile Law Amendment, s. 14 - - - - - 6, 20, 614
See LIMITATIONS, STATUTE OF. 1, 2.
19 & 20 Vict. c. 102—Common Law Procedure, s. 97 - - - - - - 572
See TAXATION OF COSTS. 1.
20 & 21 Vict. c. 40—Illicit distillation, s. 6 248
See ILLICIT DISTILLATION.
21 & 22 Vict. c. 100—Petty Sessions Clerks, s. 140, Sched. C - - - - - - 248
See ILLICIT DISTILLATION.
23 Vict. c. 4—Valuation Revision - - 157
See RATES. 3.
23 & 24 Vict. c. 97—Railways - 362, 415
See COMPULSORY PURCHASE.
23 & 24 Vict. c. 106—Lands Clauses 362, 415
See COMPULSORY PURCHASE.
23 & 24 Vict. c. 112—Defence - 362, 415
See COMPULSORY PURCHASE.
23 & 24 Vict. c. 154—Landlord and Tenant, ss. 10, 18 - - - - - - - 130
See SUBLETTING. 2.
27 & 28 Vict. c. 71—Railways - 362, 415
See COMPULSORY PURCHASE.
35 & 36 Vict. c. 68—Military Forces Localisation
See COMPULSORY PURCHASE. [362, 415
35 & 36 Vict. c. 94—Licensing, ss. 81, 82 559
See LICENSING ACTS. 2.
37 & 38 Vict. c. 57—Limitations, s. 8 - 614
See LIMITATIONS, STATUTE OF. 2.
37 & 38 Vict. c. 69—Licensing, ss. 9, 10 559
See LICENSING ACTS. 2.
40 & 41 Vict. c. 56—County Courts and Officers, s. 74 - - - - - - 603
See RECOGNISANCE.

STATUTES—*continued.*
40 & 41 Vict. c. 57—Judicature, s. 53 258, 270, 572
See TAXATION OF COSTS. 1, 5.
41 & 42 Vict. c. 52—Public Health, s. 107 340
See NUISANCE.
44 & 45 Vict. c. 49—Land Law, s. 1 39, 477
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—— s. 7 - - - - - - - - 357
See RESUMPTION BY LANDLORD.
—— s. 8 (8) - - - - - - - 30
See STATUTORY TERM.
—— s. 20, proviso 1, s. 22 - - - 27
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—— s. 57 - - - - - - - - 130
See SUBLETTING. 2.
—— s. 60 - - - - - - - - 30
See STATUTORY TERM.
48 & 49 Vict. c. 36—Artillery and Rifle Ranges
See COMPULSORY PURCHASE. [362, 415
52 & 53 Vict. c. 63—Interpretation of Statutes, s. 23 - - - - - - 362, 415
See COMPULSORY PURCHASE.
53 & 54 Vict. c. 25—Barracks - 362, 415
See COMPULSORY PURCHASE.
54 & 55 Vict. c. 54—Ranges, s. 11 - 362, 415
See COMPULSORY PURCHASE.
54 & 55 Vict. c. 57—Redemption of Rent, s. 1 1
See REDEMPTION OF RENT.
55 & 56 Vict. c. 43—Military lands 362, 415
See COMPULSORY PURCHASE.
59 & 60 Vict. c. 47—Land Law, s. 1 - 467
See FAIR RENT. 1.
—— ss. 3 (1), 5 (1) (*a*) - - - - 352
See FAIR RENT. 2.
—— s. 5 (1) (*b*) - - - - 39, 52, 477
See COVENANT AGAINST ALIENATION. DEMESNE LANDS.
—— s. 12 - - - - - - - - 357
See RESUMPTION BY LANDLORD.
—— s. 16 - - - - - - 112, 116
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—— s. 19 - - - - - 35, 39, 477
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—— s. 50 (1) - - - - - 35, 39, 477
See COVENANT AGAINST ALIENATION. SALE OF TENANCY.
—— s. 50 (2) - - - - - - 357
See RESUMPTION BY LANDLORD.

STATUTORY TERM—*Commencement of—Application to fix fair rent—First occasion on which Land Commission Court sat—Service of originating notice on Land Commission during first sitting—No motion in Court—Subsequent order fixing fair rent—Application to determine judicial rent for second statutory term—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49), *ss.* 8 (8), 60.] An originating notice of application by a tenant to fix a fair rent for his holding was served on the landlord and the Irish

STATUTORY TERM—*continued.*
Land Commission, during the extended sitting (20th of October to 12th of November, 1881), constituting the first occasion on which the Land Commission Court sat after the passing of the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), but no motion was made in Court, nor was the application "recorded," or any order or ruling made in respect of the same, during such extended sitting. An order fixing a fair rent was made on the 20th of November, 1882. An originating notice of application to fix a fair rent for a second statutory term having been served in July, 1896:—*Held*, on the authority of *Chaine* v. *Nelson* (12 L. R. Ir. 272) and *Smyth* v. *Moore* (32 L. R. Ir. 129), that no application to the Court, within the meaning of section 60 of the said Act, had been made on the first occasion on which the Court sat; that the first statutory term commenced from the rent-day next succeeding, not the day on which the Act came into force (22nd of August, 1881), but the fixing of the rent; and that the notice to fix a fair rent for the second statutory term was premature. *Harrington, Tenant; Colomb, Landlord*
[Land Com., 30

SUBLETTING — *Landlord and tenant — Land Law (Ireland) Act*, 1881, *sects.* 3 *and* 5 *— Subletting by judicial tenant — Void lease — Liability to rent or in use and occupation.*] A person who holds lands under a judicial tenancy cannot sublet them without the consent of his landlord; and if he purports to subdemise them by lease without such consent, the lease is void, and the person to whom the lease is made is not liable to be sued for the rent thereby reserved, either as rent or in use and occupation. *O'Kane* v. *Burns* - App. 591

2. —— *Lease for lives and years granted in* 1828 *— Subletting Act* (7 *Geo.* 4, *c.* 29)*— Covenant against subletting — Landlord and Tenant Act*, 1860, *ss.* 10, 18*— Land Law (Ireland) Act*, 1881, *s.* 57*— Consent by agent of landlord — Tenant for life and remainderman.*] The lease of a holding comprising 54 acres, made in 1828, was assigned in the year 1878 by a deed, describing the holding as "now in the possession of *W.*" (the assignor) "and his undertenants." At that date portions of the holding were sublet to six cottier tenants. The agent of the landlord indorsed on the deed his assent to this assignment. The landlord at that time was tenant for life of the lands. The portion of land held by three of the sub-tenants subsequently came into the possession of the immediate tenant:—*Held* (1), that the consent of the agent was a sufficient consent by the landlord, within the meaning of the Subletting Act, to the sublettings in existence at the date of the assignment. *Held* (2), that the consent given by the tenant for life was sufficient to bind the remainderman. *Robinson, Tenant; Wakefield, Landlord* - - - - App. 130

SUMMARY JURISDICTION.
See Justices.

SUMMONS — Revenue prosecution — Stamp — Jurisdiction - - - - - 248
See Illicit Distillation.

SURETY—Indemnity—Arrangement 92, 107
See Arranging Debtor.

TAXATION OF COSTS—*Action for wrong not disconnected with contract — Railway Company — Passenger — Personal injury — Negligence of Company's servants — Common Law Procedure Act*, 1853, *s.* 243*— Common Law Procedure Act*, 1856, *s.* 97*— Judicature Act, s.* 53*— G. O. LXV., R.* 4.] In an action against a Railway Company for personal injury the statement of claim alleged that the plaintiff suffered damage from the defendants' negligence in carrying the plaintiff as a passenger by railway, causing personal injuries to the plaintiff:—*Held*, that the action was not for a wrong disconnected with contract. *Meegan* v. *Belfast and County Down Railway Company* - App. 572

2. —— *Counsel's fees — Expenses of witnesses (unexamined) where verbally directed by counsel subsequent to advice of proofs — Costs of attendance of local solicitor at Assizes.*] In an action for £54, for goods sold, involving a question of agency, in which the plaintiff's case was abandoned before all the defendant's witnesses were examined, the defendant's solicitor charged in his bill of costs for fees of £10 10*s.*, £10 10*s.*, and £7 7*s.*, paid to counsel at the trial. The Taxing Master moderated these fees to £7 7*s.*, £7 7*s.*, and £5 5*s.*:—*Held*, that the fees having been paid in good faith, and being reasonable, should have been allowed. The expenses of attendance at the trial of a necessary witness (who, owing to the course of the trial, had not been examined) should be allowed where his attendance has been directed by counsel, verbally or in writing, subsequent to advice of proofs. *Gregg and Company* v. *Gardner* - - Q. B. 122

3. —— *Judgment, entry of — Action for goods sold and delivered — Defence alleging inferiority in diminution of contract price — Counterclaim for damages for breach of contract in respect of that inferiority — "Event" — Costs — R. S. C., Order XXI., Rule* 17.] The plaintiffs sued the defendant for £150 for goods sold and delivered (a boat); the defendant traversed the sale and delivery, and pleaded that the boat was not in accordance with specification, nor reasonably fit for the purposes for which she was ordered, and counterclaimed for damages for breach of contract by reason of such inferiority and unfitness. The jury found that the boat was in accordance with specification, but not "reasonably fit" for the purpose for which the defendant required her, and when delivered was inferior to contract by £30. Judgment was entered thereupon on the claim for the plaintiffs for £120, and on the counterclaim for the defendant, with 1*s.* damages.

TAXATION OF COSTS—*continued.*

On motion to review taxation :—*Held*, that the plaintiffs were entitled to the general costs of the action, including all costs applicable to any question or matter in controversy on which the plaintiffs succeeded entirely or in part; that the defendant was entitled to all costs exclusively applicable to any question or matter in controversy on his statement of defence; and that neither plaintiffs nor defendant were entitled to any costs in respect of the counterclaim. *Forrest* v. *Carte* Q.B., 314

4. —— *Judgment, entry of—Action for goods sold and delivered—Defence alleging inferiority in diminution of contract price—Counterclaim for damages for breach of contract in respect of that inferiority—"Event"—Costs—R. S. C., Order XXI., Rule* 17.] The plaintiffs sued the defendants for £840, balance due for goods sold and delivered—an engine, accumulators, and electric lamps and fittings, for the defendants' hotel—and work done and materials supplied under a contract. The defendants delivered a defence—pleading inferiority to contract, in diminution of the contract price, of the engine and of the accumulators, and lodging £670 15*s.* in Court in satisfaction—and a counterclaim for damages for the inferiority of the engine and of the accumulators, and for damages for delay. The contract price of the accumulators was £283. The jury found that the accumulators were not of the capacity contracted for, with £200 damages; and, as a separate finding, that the value of the accumulators as supplied was £83. They found that the value of the work done was £567 7*s.*, being £103 8*s.* less than the amount lodged in Court. This sum of £567 7*s.* was made up by deducting the £200, as well as the amount of certain disallowed items from the balance sued for. The other findings were in the plaintiff's favour. A verdict was thereupon directed, and judgment entered for the defendants on the claim with costs, and for the defendants with sixpence damages on paragraph 3 of the counterclaim (for breach of contract in respect of the inferiority of the accumulators), with costs, and for the plaintiffs on the rest of the counterclaim, with costs. On motion by the plaintiffs that judgment should be entered for them in the original action for £767, with costs, and for the defendants on paragraph 3 of the counterclaim for £200 damages, with costs, and for the plaintiffs on the rest of the counterclaim, with costs, or that the judgment for the defendants on paragraph 3 of the counterclaim should be set aside and judgment entered for the plaintiffs on the entire counterclaim :—The Court ordered that the judgment for the defendants in the original action with costs, should stand; that the judgment for the defendants, with sixpence damages, on paragraph 3 of the counterclaim should be varied and stand as a judgment for the defendants thereon

TAXATION OF COSTS—*continued.*

without damages and without costs, on the special ground that the £200 damages were at the instance, and on behalf of the defendants applied in reduction of the plaintiff's claim in the original action, and that the counterclaim as to such damages was therefore unnecessary; and ordered that the judgment for the plaintiffs on the rest of the counterclaim be discharged, and that the plaintiffs do have their costs of the issues found in their favour in the original action. *Curtis* v. *Armstrong* Q.B. 327

5. —— *Separate causes of action—Apportionment—Expenses of witnesses—Judicature Act, sect.* 53—*Half costs—R. S. C. I., Order LXV., Rule* 3.] In an action for trespass to the person and for money received to the plaintiff's use, the jury found for the defendant on the cause of action in *tort*, and £2 for the plaintiff on the other cause of action. Judgment was entered for the defendant with costs on the first cause of action, and for the plaintiff on the second, with legal costs if any. Certain witnesses at the trial gave material evidence on both causes of action :—*Held*, that the taxing master was right in apportioning the expenses of these witnesses; in allowing, as part of the plaintiff's costs, part of the necessary expenses of such of those witnesses as were examined on his behalf; and in taxing to the defendant, as part of his costs payable by the plaintiff, an apportioned part of the expenses of such of these witnesses as were produced for the defendant. When a plaintiff recovers less than £20 in an action of contract the one-half of the ordinary costs to which only, in the absence of a certificate he is entitled, is one-half only of disbursements as well as of profit costs. *Kennedy* v. *Healy* - - - - Ex. 258; App. 270

TENANCY FROM YEAR TO YEAR—On expiration of lease—Restraint on alienation - - - - - - 39, 477
See Covenant against Alienation.

TENANT FOR LIFE AND REMAINDERMAN—Subletting — Consent by tenant for life - - - - - - 130
See Subletting. 2.

TIME—Application to vary tithe rentcharge—Quarter Sessions commencing in November - - - - - - - 606
See Tithe Rentcharge. 5.

—— Close season for trout—5 & 6 Vict. c. 106, ss. 30, 36 - - - - - 290
See Fishery Acts. 1.

—— License to use fixed net—Calendar year—11 & 12 Vict. c. 92, ss. 22, 28 - 292
See Fishery Acts. 2.

TITHE RENTCHARGE — *Variation—"Corn principally grown in the county"—Certificate of tithe composition not stating the species of corn principally grown—Order of Quarter Sessions varying the tithe rentcharge on the price of wheat and*

TITHE RENTCHARGE—*continued.*

oats together—4 *Geo.* 4, *c.* 99, *ss.* 25, 43—1 & 2 *Vict. c.* 109, *s.* 32.] Where the original certificate of tithe composition does not state "the average price of wheat or oats" (whichever of the two the Commissioners shall consider as the "corn principally grown in the county") for the prescribed period, the Justices at Quarter Sessions, on an application to vary the tithe rentcharge, should inquire into and determine the question which of the two species of corn, wheat *or* oats, was the corn then principally grown in the county, and proceed thereon in their computation of average prices for the purposes of the applicatiou before them. *Reg.* (*Walsh and Everard*) v. *Justices of Co. Cavan* - - - - - - Q. B. 271

2. —— *Variation*—"*Corn principally grown in the county*"—*Certificate of tithe composition stating* "*wheat and oats*" *as the corn principally grown*—*Order of Quarter Sessions varying the tithe rentcharge on the price of wheat and oats together*—4 *Geo.* 4, *c.* 99, *ss.* 25, 43—1 & 2 *Vict. c.* 109, *s.* 32.] Where the original certificate of tithe composition states "wheat *and* oats" as the corn principally grown in the county for the period of seven years ending 1830, the Justices at Quarter Sessions, on an application to vary the tithe rentcharge, should proceed as if such certificate were silent on the point, and should inquire into and determine the question which of the two species of corn, wheat *or* oats, was the corn then principally grown in the county, and proceed thereon in their computation of average prices for the purposes of the application before them. *Reg.* (*Incorporated Society for promoting Protestant Schools in Ireland*) v. *Chairman and Justices of Co. Roscommon* - Q. B. 287

3. —— *Variation*—*Jurisdiction*—*Condition precedent*—*Non-compliance*—*Affixing notice to principal outer door*—4 *Geo.* 4, *c.* 99, *s.* 43.] Where the only place of religious worship in a parish, other than a ruined and doorless parish church, was a Roman Catholic chapel, it is not a sufficient compliance with the provisions of section 43 of the statute 4 Geo. 4, c. 99, which prescribes the method of revision, if the required notice was posted on a notice-board, which was fixed on a gate-pier facing the principal entrance to the chapel, but on the opposite side of the road. *Reg.* (*Saurin*) v. *Justices of Co. Meath* - Q. B. 21

4. —— *Variation*—*Petition for*—"*Then ensuing Sessions*"—*Tithe Composition Act* (4 *Geo.* 4, *c.* 99), *s.* 43.] On the the 7th September, 1895, a notice was served by three tithe-payers on the lay impropriator, stating that an application to vary the tithe rentcharge would be made to the Justices of the Peace for the county of Tipperary assembled at Tipperary for the division of Cashel on the 31st October, 1895. Notice of the intended application was affixed on the principal doors of the church in the parish, pursuant to the statute 4 Geo. 4, c. 99, on the Sundays of 22nd and 29th September, 1895. The parish in which the lands were situate was in the division of Cashel. By a proclamation of the Lord Lieutenant and Privy Council, dated the 19th October, 1871, the county of Tipperary was divided, for the purpose of Quarter Sessions, into four divisions—(1) Clonmel, of which the Sessions town was Clonmel; (2) Cashel, of which the towns were Cashel and Tipperary; (3) Nenagh, of which the towns were Nenagh and Roscrea; and (4) Thurles, of which the Sessions town was Thurles. Quarter Sessions for the county of Tipperary next after the 29th September, 1895, were held at Nenagh on the 4th October, at Thurles on the 12th October, at Clonmel on the 22nd October, and at Tipperary on the 31st October. The County Court Judge sitting at Tipperary heard the case, and made an order reducing the tithe rentcharge. On motion for a writ of *certiorari* to quash this order:—*Held*, reversing the decision of the Queen's Bench Division (Sir P. O'Brien, L.C.J., and Johnson, J., *diss.* O'Brien, J.), that the Quarter Sessions at Tipperary had jurisdiction to hear and determine the case. *Reg.* (*Creed*) v. *Justices of Co. Tipperary* [Q. B. 486

5. —— *Variation — Quarter Sessions — Time—Statute—Goulburn's Act* (4 *Geo.* 4, *c.* 99), *s.* 43—*Stanley's Act* (2 & 3 Wm. 4, *c.* 119), *s.* 6.] Where the Michaelmas Sessions for the county happened to commence on the 2nd November, and on that day an application on the part of certain tithe rentcharge-payers for revision of the tithe rentcharge came on for hearing, such tithe rentcharge-payers having first duly posted, in September, the notices required by the statute (4 Geo. 4, c. 99, s. 43), and having, on the 26th September, served on the Clerk of the Peace, as representing the Court of Quarter Sessions, a notice signed by them of their intention to apply:—*Held*, *per Curiam*, that the Justices had jurisdiction to revise the rentcharge, notwithstanding the tithe-owner's objection that the application to vary was not made between the 1st May and 1st November. *Held*, *per* O'Brien and Johnson, JJ., that the service, before the 1st November, on the officer of the Court, of notices of the application, was a sufficient compliance with s. 43. *Held*, *per* Madden, J., that the only mandatory provision, as to time, in s. 43 of Goulburn's Act, and s. 6 of Stanley's Act (2 & 3 Wm. 4, c. 119) was that the required notices should be posted between the 1st May and 1st November, and that accordingly the application made at Quarter Sessions on the 2nd November was in time. *Reg.* (*Beaufort*) v. *Justices of Co. Meath* Q. B. 606

TOLLS — Rates — Occupation — Towns Improvement Act, 1854 - - - 552

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TORT—Action of—Acceptance of sum less than £5 lodged in Court—Certificate, R. S. C. (1893) Order LXV., R. 4 - - 127
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—— Tithe rentcharge — Notice of application—Posting - - - - - - 21
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—— Tithe rentcharge — Notice of application—"Then next ensuing Sessions" 486
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—— Tithe rentcharge — Time of application — Quarter Sessions commencing in November - - - - - - 606
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—— "Penalty as liquidated damages"—Building contract - - - - - 601
See LIQUIDATED DEMAND.

—— "Then ensuing Quarter Session—4 Geo. 4, c. 99, s. 43 - - - - - 486
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WRIT OF RESTITUTION—*Eviction for non-payment of rent—Redemption—Land Law (Ireland) Act*, 1896, *s.* 16—Res Judicata.] On the 25th November, 1895, *S.*, the landlord of an agricultural holding, commenced an action to recover possession for non-payment of rent, there being three and a-half years' rent due at the date of the writ. On the 7th February, 1896, judgment was marked, and on the 19th April, 1896, a caretaker's notice, under sect. 7 of the Land Law (Ireland) Act, 1867, was served by the landlord. The Land Law (Ireland) Act, 1896, came into operation on the 14th August, 1896. *H.* and his wife, who had become entitled to the tenant's interest, tendered, on the 18th August, 1896, and afterwards, to *S.* two years' rent, which, being refused, they lodged two years' rent in Court on the 9th October, 1896, and moved for a writ of restitution:—*Held*, by the Court of Appeal (reversing the decision of the Exchequer Division (Andrews and Murphy, JJ.), that the applicants were entitled to an order for restitution, they undertaking to pay the rent accrued since the commencement of the action. *Spaight* v. *Baker* - - Ex. 112; App. 116

WRIT OF SUMMONS—Specially indorsed.
See SPECIALLY INDORSED WRIT.

YEARLY TENANCY.
See TENANCY FROM YEAR TO YEAR.

THE END.

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